SUPREME COURT, U.S.
FILED

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In The
Supreme Court of the United States

LFP PUBLISHING GROUP, LLC,
d/b/a Hustler Magazine,
Petitioner,

v.

MAUREEN TOFFOLONI, as Administrator and Personal Representative of the Estate of Nancy E. Benoit,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit erred in refusing to hold as a matter of law that the Freedom of the Press Clause of the First Amendment insulates Petitioner publisher from liability on Respondent Estate Administrator's claim alleging that non-obscene nude photographs of her public figure Decedent, in an article in Petitioner's national magazine on Decedent's life and death, violated the Georgia common law posthumous right of publicity, where Decedent's murder was a national news story of great public interest.

2. Is publication of nude, non-obscene photographs of a murdered public figure as part of a national magazine article on her life and death to be deemed "newsworthy" and insulated from liability by the First Amendment right of freedom of the press, where Decedent's murder by her public figure husband was a national news story?

DISCLOSURE OF PARTIES (RULE 14.1(b))

The parties to the proceedings are: Petitioner (and Defendant) LFP Publishing Group, LLC; Respondent (and Plaintiff) Maureen Toffoloni; and Defendant Mark Samansky, who has not appeared in the action.

DISCLOSURE OF PARENT COMPANIES (RULE 29.6)

Petitioner LFP Publishing Group, LLC is wholly-owned by LE Publishing Advisors, LLC, which is in turn 90% owned by L.F.P., Inc., which has no corporate parent. All such entities are privately owned.

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OPINIONS AND ORDERS BELOW

On October 6, 2008, the United States District Court for the Northern District of Georgia, Hon. Thomas W. Thrash, Jr., entered an Order with opinion granting Petitioner's motion to dismiss the removed Complaint of Respondent Maureen Toffoloni, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for failure to state a claim for relief on Respondent's single substantive claim that Petitioner allegedly violated her Decedent daughter's Georgia common law posthumous right of publicity; on October 7, 2008, the Court Clerk entered Judgment dismissing the action. The Order and Judgment are reprinted herein at Appendix 24a, 35a.

On June 25, 2009, the United States Court of Appeals for the Eleventh Circuit entered a decision reversing the district court's dismissal of the action and remanding the case for further proceedings, in an opinion reported as Toffoloni v. LFP Publishing Group, LLC, et al., 572 F.3d 1201. The opinion is reprinted herein at Appendix 1a.

On August 27, 2009, the United States Court of Appeals for the Eleventh Circuit entered an Order denying Petitioner's motion for Rehearing and Rehearing En Banc of its opinion reversing the district court's dismissal of this action; said Order is reprinted herein at Appendix 33a.

JURISDICTION OF THIS COURT

The Order of the United States Court of Appeals for the Eleventh Circuit denying Petitioner's motion for rehearing and rehearing en banc of its earlier order reversing the order of the district court for the Northern District of Georgia dismissing Respondent's complaint, was entered on August 27, 2009. Jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. § 1254 and Rule 13 of the Rules of the Supreme Court.

Jurisdiction in the federal court of original instance was based on the removal provisions of 28 U.S.C. § 1441(a), due to diversity of citizenship.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

This case presents an important issue of national significance - whether pursuant to the right of the freedom of the press as set forth in the First Amendment to the United States Constitution, Petitioner's publication of non-obscene nude photographs of a public figure Decedent in its national magazine in a two-page article on her life and death, is immunized from liability for an alleged violation of the Georgia common law posthumous right of publicity, where Decedent's death was a national news story. The case also raises the issue of whether the determination of "newsworthiness" of otherwise lawful nude photographs of a murdered public figure is to be made by the publisher, or by the courts. The opinion of the Eleventh Circuit refusing to recognize Petitioner's First Amendment rights flies in the face of prior rulings of this Court and other Circuits. particularly insofar as the court of appeals' decision is premised on the faulty notion that the First Amendment right to publish need be weighed against community morals.

A. Proceedings Below

This is a lawsuit brought by Respondent Maureen Toffoloni (hereinafter "Respondent") as Administrator of the Estate of her late daughter, Nancy Benoit (hereinafter "Decedent" or "Benoit") against Petitioner LFP Publishing Group, LLC (hereinafter "Petitioner" or "LFP"), the publisher of the internationally known adult-themed gentlemen's publication, *Hustler* magazine. The action concerns Petitioner's publication of a two-page news article on

the life and death of Decedent Benoit, published in the March, 2008 issue of *Hustler*, including fully and partially nude, posed photographs of Ms. Benoit extracted from a videotape previously made by Defendant Mark Samansky ("Samansky")[1] who is not a party to this Petition.

Respondent commenced this action in the Fayette County, Georgia Superior Court seeking a temporary restraining order to prevent publication of the subject photographs of Benoit in *Hustler* magazine, and asserting a single substantive cause of action against LFP for damages for its alleged violation of the Georgia common law posthumous right of publicity. Petitioner removed the case to the district court for the Northern District of Georgia based on diversity of citizenship, 28 U.S.C. § 1441(a).[2] The district court denied Respondent's motions for a temporary restraining order and for a preliminary injunction against publication, and she served her Complaint (Appendix D hereto).

Petitioner LFP moved in the district court to dismiss the action for failure to state a claim for relief pursuant to Rule 12(b)(6) of the Federal Rules

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[1] Defendant Samansky previously filed for bankruptcy in the District of Colorado where he presumably resided, has not appeared in this action, and is not a party to the instant Petition. Samansky is not represented by counsel for Petitioner LFP.

[2] Respondent alleges she is a resident of the State of Florida and that Decedent was a resident of the State of Georgia; Petitioner is a Delaware limited liability company with its principal offices located in California; the amount in controversy exceeds $75,000, exclusive of interest.

of Civil Procedure. The lower court granted the dismissal motion on the grounds that the story of Decedent's life and death, and the accompanying nude photographs of Decedent, were newsworthy and outside the ambit of the Georgia right of publicity. The district court found it was undisputed by Respondent that "Ms. Benoit's death was a 'legitimate matter of public interest and concern,'" and accordingly "publication of Ms. Benoit's nude photographs cannot be described as a mere commercial benefit for [LFP]" (28a) – which would be a prerequisite for a right of publicity claim. Thus, LFP's publication of the subject photographs was protected by "the freedom of press exception to the right of publicity" as a matter of law (29a).

Respondent appealed, and an Eleventh Circuit panel reversed and reinstated the Complaint, in an opinion published at 572 F.3d 1201. That court held that the photographs of Benoit taken more than 20 years before their publication "were neither related in time nor concept" to the story of admitted public interest, and therefore proclaimed that "these photographs do not qualify for the newsworthy exception to the right of publicity" (572 F.3d at 1213). Central to the court's analysis was its opinion that right of privacy protected by the Due Process Clause of the Fourteenth Amendment is as established and fundamental as the right of freedom of speech and of the press explicitly set forth in the First Amendment. Consequently, since the right of privacy impliedly guaranteed by the Due Process Clause exists on the same constitutional plane as the explicit rights stated in the First Amendment, the court reasoned that Petitioner's constitutional right

to publish must be balanced against "that which resonates with our community morals." (572 F.3d at 1208). The court did not discuss the First Amendment implications or the chilling effect of its opinion, but remanded to the trial court for further proceedings (23a). LFP then petitioned the Eleventh Circuit for a rehearing or rehearing of its decision en banc, which petition was denied in an Order of August 27, 2009 (33a).

LFP now petitions this Court to grant a writ of certiorari as to the Eleventh Circuit panel decision reversing dismissal of the instant Complaint, on grounds of Petitioner's First Amendment right of freedom of the press.

B. Factual Background

On Petitioner's motion to dismiss for failure to state a claim for relief, the facts are taken from the Respondent's Complaint, filed in the Georgia Superior Court (37a), and the opinions already issued herein (24a-30a; 1a-23a).[3]

Respondent Toffoloni is the mother and Administrator of the Estate of the late Nancy Benoit. In June, 2007 (A-38, ¶15), Benoit and her son were apparently murdered by their respective husband and father Christopher Benoit, a well-known professional wrestler, who then committed suicide

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[3] Under the familiar federal standard, on a motion to dismiss the courts must take all factual allegation of the complaint as true, but need not accept as true "a legal conclusion couched as a factual allegation." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50 (2009).

(41a, ¶15; 2a). At the time of her murder, Benoit was herself a model and professional woman wrestler, and a well-known public figure in her own right (41a, ¶15).

Some 20 years prior to her death, Benoit had voluntarily posed fully and partially nude for photographs and a videotape, taken by named Defendant Mark Samansky, a professional photographer, in the presence of her then- husband (38a, ¶3; 40a, ¶9; 50a, ¶5). After the photographs and videotape were taken, Benoit allegedly changed her mind about having the pictures published, and instead requested Samansky to destroy them. While allegedly agreeing to do so, Samansky apparently destroyed the photographs but kept the videotape (40a-41a, ¶¶12,13; 41a, ¶16). After the Benoit murder-suicide became national and international news (2a), Samansky retrieved the videotape, extracted photographs therefrom (including the nude photographs of Benoit taken as a young woman), and conveyed the right to publish his copyrighted images to Petitioner LFP for publication in *Hustler* Magazine (41a-42a, ¶¶16,17).

When Respondent discovered the forthcoming publication of the nude photos of Benoit in *Hustler*, she demanded that publication cease (42a, ¶18), but Petitioner refused her request based on its rights to publish newsworthy material under Georgia law and the First Amendment, as advised by its counsel (55a-59a); moreover, publication had already occurred. Respondent then brought suit in Georgia state court, seeking a temporary restraining order against the publication, and Petitioner removed the action to

federal court by reason of diversity of citizenship. By the time district court hearings were held in February 2008 on Respondent's motions for a temporary restraining order and later a preliminary injunction, the subject nude photographs of Decedent Benoit had already been published in the March 2008 issue of *Hustler*,[4] rendering the motions moot; the motions for injunctive relief were then denied by the district court (25a).

Respondent asserted a single substantive cause of action for monetary damages, based on LFP's alleged violation of Decedent Nancy Benoit's right of publicity under Georgia common law (45a, ¶30). Petitioner LFP moved to dismiss pursuant to Rule 12(b)(6), which motion was granted by the court, Hon. Thomas W. Thrush, and Respondent appealed (3a). The dismissal was reversed by the Eleventh Circuit panel on June 25, 2009, reported at 572 F.3d 1201, and remanded to the district court for further proceedings (23a). A petition for rehearing and rehearing en banc was denied on September 25, 2009 (33a).

The nude pictures of Benoit had been voluntarily posed in the presence of her then-husband (50a, ¶5), were not obscene, and were published as part of a full two-page news article on her life and death in the March 2008 issue of *Hustler* Magazine. Benoit was admittedly a public figure prior to her death, and her murder was concededly a media story of great public interest. Petitioner LFP

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[4] *Hustler* magazine is published 13 times a year (12 monthly issues plus an extra Holiday issue); thus a new issue come out every four weeks.

asserts that as part of a news story of legitimate public concern, the article did not violate the Georgia right of publicity. However, even if the photographs are assumed to violate Georgia law for purposes of this Petition, a finding of liability in this action would be in violation of LFP's right of freedom of the press pursuant to the First Amendment to the United States Constitution, and result in a chilling effect on publishers in general, not just adult-themed magazines such as *Hustler*. Moreover, the decision of whether or not to publish otherwise lawful, non-obscene photographs of a deceased public figure illustrating a story of public interest should be made by the editors of *Hustler* Magazine and other publishers, and not by the courts, as has been stated by this and other courts in various opinions.

REASONS FOR GRANTING THE PETITION

I. CONTRARY TO THE ELEVENTH CIRCUIT OPINION, THE FIRST AMENDMENT RIGHT OF FREEDOM OF THE PRESS PROSCRIBES RESPONDENT ESTATE ADMINISTRATOR'S CLAIM FOR VIOLATION OF THE GEORGIA RIGHT OF PULICITY AS TO NUDE PHOTOGRAPHS OF HER DECEDENT.

A. The Benoit Nude Photographs are Protected by the First Amendment.

It is long settled law that the First Amendment to the United States Constitution, stating as relevant: "Congress shall make no law . . .

abridging the freedom of speech or of the press . . . ." applies to the states as well as to the federal government by virtue of the Fourteenth Amendment. See, e.g., Virginia v. Black, 538 U.S. 343, 358 (2003). It is also established that even indecent, non-obscene sexual expression is protected by the First Amendment. Reno v. American Civil Liberties Union, 521 U.S. 844, 874-75 (1997); Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 126 (1989). The protection of the First Amendment has been specifically applied to nudity. See, Jenkins v. Georgia, 418 U.S. 153 (1974). Thus, the nude photographs of Decedent Benoit, which are not obscene, constitute expression protected by the First Amendment with regard to Respondent's instant claim.

Here, Respondent Toffoloni asserts a single substantive cause of action for violation of Decedent Nancy Benoit's right of publicity (45a, ¶ 30), first recognized as a posthumous common law right in Georgia in Martin Luther King, Jr. Center v. American Heritage Products, Inc., 250 Ga. 135 (1982). It may be noted that Respondent does not and can not assert a substantive claim for an alleged violation of the Georgia right of privacy, since such a cause of action expires with the death of the person whose right of privacy has purportedly been violated. See 2 J. Thomas McCarthy, The Rights of Publicity and Privacy, § 9:1, pp. 394-95 (2d ed. 2009) [Privacy rights protect human dignitary values measured by mental and physical suffering and reputational damages; "Such classic 'privacy' rights die with the person whose privacy was allegedly invaded."].

Accord, Pavesich v. New England Life Ins. Co., 122 Ga. 190, 210 (1905).

B. The Georgia Right of Publicity has an Exemption for Newsworthy Matters.

Even aside from the First Amendment, the Georgia common law right of publicity carries its own newsworthiness exemption from liability. Thus, in the leading Martin Luther King case, supra, the Georgia Supreme Court found liability for defendant's commercial sale of busts of Dr. King over the plaintiff's objections. In first enunciating its authorization of posthumous publicity rights, the Georgia court expressly limited that right of publicity to those circumstances in which use of the claimant's name or photograph "is not authorized as an exercise of freedom of the press." 250 Ga. at 143. Thus, even aside from First Amendment rights, Georgia case law itself expressly limits the state's right of publicity claim to actions that do not violate the freedom of the press.

Here, the district court held that this limitation would necessarily be fatal to Toffoloni's claim; otherwise, "no newspaper might identify any person or any incident of his life without accounting to him for violation of his 'right of publicity'." (29a), citing the Martin Luther King decision, 250 Ga. at 151-52.

In its opinion below, the Eleventh Circuit itself recognized that Georgia follows a "newsworthiness" exception to an action asserting

the right of publicity. 572 F.3d at 1208. As the court below stated:

> The Supreme Court of Georgia has held that "where an incident is a matter of public interest, or the subject matter of a public investigation, a publication in connection therewith can be a violation of no one's legal right of privacy." Waters v. Fleetwood, 212 Ga. 161, 91 S.E.2d 344, 348 (1956). (572 F.3d at 1208).

Georgia's newsworthiness exemption was summarized by the Eleventh Circuit: "where a publisher may be precluded by the right of publicity from publishing one's image for purely financial gain, as in an advertisement, where the publication is newsworthy, the right of publicity gives way to freedom of the press." (572 F.3d at 1208).

Thus, the Eleventh Circuit correctly recognized – at least in principle – the "newsworthiness" exception to the Georgia right of publicity. Where that court went terribly wrong, however, was its determination that even though the nude photographs of Benoit were used as part of an article on a deceased public figure whose murder was unquestionably a matter of great public interest – rather than for a purely commercial or advertising use – it nevertheless found that said photographs, "do not qualify for the newsworthiness exception to the right of publicity." (572 F.3d at 1213). Under applicable law and precedent, that determination was erroneous.

II. THE ELEVENTH CIRCUIT'S OPINION IS CONTRARY TO THE PRECEDENTS OF THIS COURT AND OTHER CIRCUITS DECLARING THAT UNDER THE FIRST AMENDMENT RIGHT OF FREEDOM OF THE PRESS, THE "NEWSWORTHINESS" OF NUDE PHOTOGRAPHS OF A MURDERED PUBLIC FIGURE USED TO ILLUSTRATE A MAGAZINE ARTICLE OF PUBLIC INTEREST ON DECEDENT'S LIFE AND DEATH IS TO BE DETERMINED BY THE PUBLISHER, NOT THE COURTS.

A. Under this Court's Opinions "Newsworthiness" is Determined by Publishers.

The crux of this Petition is a seemingly simple question. Given an article of public interest on the life and murder of a public figure, who should decide whether or not the publication of non-obscene, posed nude photographs of her to illustrate the article is "newsworthy"? Such a determination must be made within the limits of the freedom of the press afforded to publishers by the First Amendment to the United States Constitution – the Crown Jewel of the Bill of Rights.

It is long-established in this country that First Amendment guarantees of freedom of speech and of the press are not confined to political expression and comment, but go far beyond that. As stated by Justice Brennan in the seminal opinion in Time, Inc.

v. Hill, 385 U.S. 374 (1967), regarding the widespread publication of personal matters:

> One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press. Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period. (385 U.S. at 388).

Given this broad language as to what is protected by Constitutional freedom of the press, as stated by Professor McCarthy, it is no wonder that: "Judges are uncomfortable with deciding that some information which is demanded by some people is of 'no concern' to the public." Accordingly, "most judges in fact have adopted a laissez faire attitude and 'simply accept the press's judgment about what is and what is not newsworthy.'" 2 J. Thomas McCarthy, The Rights of Publicity and Privacy, § 8:51, p.181 (2d ed. 2009).

In this case, the Eleventh Circuit panel concluded on its review of the subject article that the nude photographs of Benoit published by Petitioner were not incidental to a newsworthy article; rather, the article was incidental to the photographs. (572 F.3d at 1213). However, such a determination is contrary to the spirit and opinions of this Court and other circuits as to who should decide newsworthiness under the First Amendment.

Thus, in Regan v. Time, Inc., 468 U.S. 641 (1984), this Court recognized that, "A determination concerning the newsworthiness or educational value of a photograph cannot help be based on the content of the photograph and the message it delivers." 468 U.S. at 648. Accordingly, the government's approval of a photograph is often message - dependent, and therefore discriminates based on the content of the message, which cannot be tolerated under the First Amendment. 468 U.S. at 648-49.

Shortly thereafter, the Court, citing the Second Circuit dissent in the opinion below, stated: "As Judge Meskill wisely noted, '[c]ourts should be chary of deciding what is and what is not news.' (Citations omitted)." Harper & Rowe Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 561 (1985).[5] Accord, Lerman v. Flynt Distributing Co., 745 F.2d 123, 139 (2d Cir. 1984) ["[C]ourts are, and should be,

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[5] To the extent *Hustler* magazine may be considered by some a publication not primarily known for presenting "hard" news, it is long-established that "entertainment, as well as news, enjoys First Amendment protection." Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 578 (1977). *Hustler* magazine regularly presents social and political news and commentary within its pages, in addition to entertainment news.

reluctant to define newsworthiness"], cert. denied, 471 U.S. 1054 (1985).

In a somewhat different context involving remedies for defamatory statements against private individuals, this Court earlier wrote generally with regard to reporting on matters of public interest, as herein:

> ...it would occasion the additional difficulty of forcing state and federal judges to decide on an ad hoc basis which publications address issues of "general or public interest" and which do not—to determine, in the words of Mr. Justice Marshall, "what information is relevant to self-government." We doubt the wisdom of committing this task to the conscience of judges. (Citation omitted).

Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974).

The foregoing has been largely summarized by Dean Prosser in a well-known law review article, William L. Prosser, "Privacy," 48 California Law Review, 383, 412 (1960)["[t]o a very great extent, the press, with its experience or instinct as to what its readers will want, has succeeded in making its own definition of news"].

B. The Eleventh Circuit Misinterpreted the Constitutional Standard for Newsworthiness.

Notwithstanding the foregoing caveats by this Court as to avoiding judicial interference with a publisher's determinations of what it deems "newsworthy," the Eleventh Circuit has nevertheless leapt into the fray with its own interpretation thereof.

Thus, the court below initially went through concepts of privacy, and the history of Georgia common law with regard to the right of privacy evolving into the right of publicity, from the early decision in Pavesich v. New England Life Ins. Co., 122 Ga. 190 (1905) [seminal case in Georgia right of privacy], through Cabaniss v. Hipsley, 114 Ga. App. 367 (1966) [first Georgia appellate court to recognize a separate right of publicity], through the leading case of Martin Luther King, Jr. Center v. American Heritage Products, Inc., 250 Ga. 135 (1982) [setting parameters for Georgia common law posthumous right of publicity].

In the Martin Luther King case, the Georgia Supreme Court indicated that a right of publicity existed for public and private citizens alike not to have their names and photographs used for the financial gain of the defendant without consent, "where such use is not authorized as an exercise of freedom of the press." 250 Ga. at 143. Thus, the Georgia Supreme Court recognized that the right of publicity was necessarily subordinated to the freedom of the press, and required a showing of

financial gain by the unauthorized user. It is noteworthy that the relevant early Georgia cases such as Pavesich, supra, involved the right of privacy where the plaintiff's photograph was used in a commercial advertisement without permission. Similarly, in the Martin Luther King case, a bust of the late Dr. King was produced and sold by defendant without authorization in a direct profit-making activity without any specific public interest component. That is not the case here, where the photographs of decedent Nancy Benoit were used to illustrate a magazine article of public interest on her life and death, as opposed to being part of an advertisement or the direct sale of a product bearing her name or likeness.

These cases finding liability stand in stark contrast to the Georgia Supreme Court decision in Waters v. Fleetwood, 212 Ga. 161 (1956). There, the court held there was no actionable right of privacy under Georgia law, even for publication of gratuitous, sensational photographs alongside a legitimate news article. Rather, the court denied a mother's claim to recover damages for invasion of privacy under Georgia law arising from a newspaper's publication and sale of photographs of the partially decomposed body of her 14-year-old murder victim daughter, after the body was removed from a river. 212 Ga. at 161-62. In addition to the newspaper article, the court also insulated from liability the defendant newspaper's separate sale of copies of the photographs which had appeared in the newspaper aside from the newspaper story, stating that "the same rule must apply as would apply to the publication of the photographs in the paper." 212

Ga. at 167. Petitioner submits that the photographs of the decomposed body of a young girl (which were not voluntarily posed) are far more egregious than the nude photographs of Decedent and public figure Nancy Benoit as part of an article of general public interest on her life and death.

Nevertheless, assuming *arguendo* that the Eleventh Circuit correctly found the subject nude photographs of Benoit violated the Georgia right of publicity for purposes of this Petition, such a claim would still be an unconstitutional violation of Petitioner LFP's First Amendment right of freedom of the press.

In seemingly seeking to become Editor-in-Chief of *Hustler* magazine, the Eleventh Circuit has arrogated to itself the decision that publication of the subject nude photographs of Nancy Benoit was not newsworthy within the protection of the First Amendment freedom of the press. In its analysis, the court failed to cite any of the leading Supreme Court decisions in this area set forth above, such as Hill, Regan, or Harper & Rowe. Rather, the only opinion of this Court cited below was its decision in Zacchini v. Scripps-Howard Broadcast Co., 433 U.S. 562 (1977), that the right of publicity protects the economic value inherent in the right of publicity. 572 F.3d at 1207. However, that case is entirely distinguishable on its facts, involving the defendant's videotaping and televising the plaintiff's complete "human cannonball" entertainment act without his permission. The Court's 5-4 decision narrowly ruled that a television station's appropriating a performer's entire commercial act

crossed the line and was not insulated from liability by the First Amendment. Here, there is little or no commercial value to the nude images of Benoit, since her mother, Respondent Toffoloni, has only indicated a desire to suppress the nude photographs of her daughter, not to publish them.

Moreover, the Eleventh Circuit opined without reference to legal authority, that the rights of freedom of speech and press guaranteed by the First Amendment and the right of privacy guaranteed by the Due Process Clause are equal fundamental constitutional rights that must be balanced in a particular case by weighing the First Amendment right of publication against the community morals. 572 F.3d at 1207-08. It then stated that the Georgia courts have accordingly adopted the "newsworthiness" exception to the right of publicity, citing Waters v. Fleetwood, supra, 532 F.3d at 1208.

The circuit court substantially misapprehends the law herein. While courts have duly recognized a constitutional right of privacy under certain circumstances, as already demonstrated above, the right of privacy is a personal one that dies with the individual who possesses it. Rather, this case involves the very different right of publicity, which in Georgia survives the death of the publicity right holder (here Nancy Benoit) because it is a state property right – as opposed to a personal right – that may be assigned or devised to others. However, the Georgia right of publicity is merely a creation of the state common law, and therefore cannot be deemed a fundamental constitutional right capable of

counterbalancing and outweighing LFP's express First Amendment right of freedom of the press to publish an article of public interest on the highly publicized murder of a public figure. Thus, there can be no balancing of rights to be applied in this case. Here, the explicit First Amendment right of freedom of the press must prevail over the Decedent's common law posthumous right of publicity, or perhaps some amorphous claim of substantive due process, and state law must yield to the federal Constitution.

The Eleventh Circuit itself, following Georgia law, agreed that even a commercial use in a right of publicity context must give way to the freedom of the press for a newsworthy publication. However, its referenced Georgia cases of Pavesich v. New England Life Ins. Co., 122 Ga. 190 (1905), and Waters v. Fleetwood, 212 Ga. 161 (1956), cited by the court (572 F.3d at 1708), primarily equate a commercial use to an advertisement.[6] Here, it is undisputed that the subject photographs were part of an article on a matter of public interest, and not in an advertisement or a direct commercial sale of any kind.

Again, the Eleventh Circuit, without any attempt to analyze this Court's First Amendment freedom of the press cases disfavoring a judicial determination of newsworthiness, conjured up a "straw man" to knock down, asserting that had LFP published the nude photographs of Benoit by

[6] Martin Luther King, Jr. Center v. American Heritage Products, Inc., 250 Ga. 135 (1982), involved a direct commercial sale of a bust in the image of Dr. King.

themselves without a corresponding article, that publication would unquestionably not qualify for the newsworthiness exception. 572 F.3d at 1209. However, that is just not the case herein – the photographs were part of a full two-page article on Benoit's life and death. Thus, the Eleventh Circuit was left with the task of asserting that the publication of the photographs was merely incidental to its commercial purpose. The court contended that:

> Although LFP argues that the photographs were illustrative of the substantive, biographical article included in *Hustler*, our review of the publication demonstrates that such is not the case. These photographs were not incidental to the article. Rather, the article was incidental to the photographs. (572 F.3d at 1209; emphasis supplied).

Unfortunately, this type of "review" by an appellate court is exactly the type of judicial analysis that this Court warned about avoiding in Harper & Rowe, et al., supra.

In an attempt to justify its conclusion that the publication was primarily commercial, the court notes that the cover of the March 2008 issue of *Hustler* states in capital letters, "Wrestler Chris Benoit's Murdered Wife Nude." However, this proclamation was just one of nine cover statements describing -+material inside the March 2008 issue, along with a large picture of the cover model and a

title in large capital letters of the name of the magazine and other material therein. The reference to the "Murdered Wife" occupies but a small fraction of the cover (which specifies wrestler Chris Benoit and does not mention Nancy Benoit by name at all) and simply cannot convert the entire article and photographs into a "commercial use" sufficient to negate Petitioner's First Amendment rights.

Perhaps the primary rationalization of the Eleventh Circuit is its setting up a false scenario that, under LFP's arguments, any notorious death would result in a carte blanche right to publish all images of that person taken during his or her lifetime, "regardless of whether those images were intentionally kept private, and regardless of whether those images are of any relationship to the incident currently of public concern." (572 F.3d at 1210).

In fact, LFP has not made that argument. Petitioner agrees that actual photographic images of Benoit used principally for advertising purposes or for direct sale to the public would be "commercial speech" that would likely not defeat a right of publicity claim against it. Moreover, Decedent Nancy Benoit was not just any person, but a conceded public figure in her own right prior to her murder. However, like a common law suit for defamation, any claim by her under the right of privacy died with her, leaving only a right of publicity. That right itself applies only to commercial uses, such as advertising or direct sales of a product bearing decedent's likeness, as in the Martin Luther King case.

Here, the subject nude photographs of Decedent are not on the cover of *Hustler* magazine, but on the inside on pp. 40-41, and are part of an article on the life and death of a person very much in the national and international news at the time of the publication of the magazine. For a court to declare that these pictures are not newsworthy and outside of the protection of the First Amendment is simply in contravention of this Court's jurisprudence, as well as the learned opinions of Professors McCarthy and Prosser, supra. Moreover, such a precedent would apply not just to *Hustler* magazine and its publisher Larry Flynt, but to other more "mainstream" books and magazines as well. If allowed to stand, this decision would cast a chilling effect over the entire concept of freedom of the press.

In its rationale attempting to explain why the subject nude photographs of Benoit were not newsworthy, the Eleventh Circuit stated that they were not related to the "incident of public concern," which it found to be limited to Benoit's death. 572 F.3d at 1211. However, that is an erroneous analysis of the newsworthy issue. The editors of *Hustler* magazine found that the life and death of Decedent Benoit was of interest to the magazine's readers. As part of Benoit's life story, she unquestionably posed for nude photographs as a young woman – a true fact about her life. *Hustler* then chose to publish photographs illustrating that portion of Benoit's life, as of interest to its readers. Under the applicable legal principles, those photographs were clearly related to an article of public interest, and were therefore part of the newsworthiness exception to the Georgia right of

publicity; if they were not, they were surely protected by the First Amendment.

The panel opinion extensively relied upon the earlier opinion in Douglass v. Hustler Magazine, Inc., 769 F.2d 1128 (7th Cir. 1985). There, defendant publisher (a predecessor of Petitioner) was found liable for damages under plaintiff's false light privacy claim, as well as for commercial appropriation of her rights, by publishing nude pictures of her (originally taken for *Playboy* magazine) without her permission.

The Douglass case is readily distinguishable. There, plaintiff Robyn Douglass was a living, professional model, fully entitled to assert false light and other claims under the right of privacy, wherein she was regularly compensated for her pictures. The nude photographs taken of her were not remotely related to a newsworthy story of national media concern – there was no event of public interest (such as a sensational murder) that thrust her into the national news and made her the subject of substantial public interest. The court therein even noted that the subject nude photographs of Ms. Douglass were uncopyrighted, wheras the nude photographs of Benoit were authorized by Defendant Samansky, the photographer and copyright holder.

In Douglass, the Seventh Circuit's comments with regard to plaintiff's lack of consent for publication of her nude photographs and the First Amendment are of particular relevance:

> To forbid *Hustler* to publish any photographs of people without their consent merely because it is an offensive, though apparently a lawful magazine, would pretty much put *Hustler* out of the news business, would probably violate the First Amendment, and would in any event cross outside the accepted bounds of the right of publicity. (769 F.2d at 1139).

The Eleventh Circuit below made no mention of this aspect of the Douglass case. Moreover, had Benoit still been living while nude photographs of her taken in private were published without her consent, this would be a very different case with regard to her right of privacy, as in Douglass. In any event, to the extent the Eleventh Circuit opinion rests on the alleged desire of Decedent Benoit to keep her nude photographs from being published, that is just an allegation made by Respondent Toffoloni, taken to be true for purposes of Petitioner's dismissal motion and not for any other reason. Surely the desire of a public figure to keep unflattering photographs of her from publication cannot be allowed to limit the freedom of the press to publish such photographs if they are related to a newsworthy event of public interest. Otherwise, celebrities photographed in public in a drunken stupor or without their makeup in a candid photograph could prevent publication thereof simply because such pictures do not present them in the way their publicists would like.

To conclude this aspect, the Eleventh Circuit ultimately found that even though the article on Benoit's life and death may have been of public interest, her nude photos taken at least 20 years earlier had no relationship to the "incident of public concern" of Benoit's murder. 572 F.3d at 1211. Thus, the court attempted to distinguish the Georgia Supreme Court decision in Waters v. Fleetwood, 212 Ga. 161 (1956), involving a newspaper's publication of photographs of a murdered child's partially decomposed body, on the grounds that there the photographs of the body were directly related to the "incident of public interest," namely her murder.

There is no basis for such a distinction; nor does the Eleventh Circuit cite any authority for such a "timeliness" requirement. It is noteworthy that in its well-known decision in Time, Inc. v. Hill, 385 U.S. 374 (1967), this Court rejected such a premise, ruling that a *Life Magazine* article on the opening of a new play based on a real incident was a matter of public interest, though the actual incident was several years old at the time. This Court wrote:

> "No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression. (Citation omitted)." (385 U.S. at 388)

Lower federal courts have similarly written that there is no requirement limiting newsworthiness to strictly recent events. See, Time,

Inc. v. Johnston, 448 F.2d 378, 381-82 (4th Cir. 1971) ["No rule of repose exists to inhibit speech relating to the public career of a public figure so long as newsworthiness and public interest attach to events in such public career."]; William O'Neil & Co. v. Validea.com, Inc., 202 F. Supp. 2d 1113, 1117 (C.D. Cal. 2002) ["The 'news' exception is not restricted to current events; the [press] may legitimately inform and entertain the public with the reproduction of past events ... ."] (Interior citations and quotations omitted). Thus, the unsupported assertion by the Eleventh Circuit that the passage of time negates the newsworthiness of the subject photographs of Benoit, lacks foundation, and is contrary to much more persuasive authority.

C. Other Circuits Hold that "Newsworthiness" is to be Broadly Construed Under the First Amendment.

Contrary to the Eleventh Circuit opinion in this case, other circuits have taken a much broader approach with regard to First Amendment protections of freedom of the press concerning publication of matters of public interest. For example, the Fifth Circuit gave a more expansive description of what is newsworthy and protected by the First Amendment in its extensive discussion in Lowe v. Hearst Communications, Inc., 487 F.3d 246 (5th Cir. 2007). There, the court stated in general:

> The test for determining newsworthiness is to be construed broadly, extending beyond "the dissemination of news either in the sense of current events or commentary upon public affairs" to include "information concerning interesting phases of human activity embrac[ing] all issues about which information is appropriate so that individuals may cope with the exigencies of their period." (Citation omitted). (487 F.3d at 250).

In Lowe, the Fifth Circuit further explained its rationale with regard to media determinations of newsworthiness as opposed to courts acting as "super editors." There, the circuit court further explained:

> "[W]e are not prepared to make editorial decisions for the media regarding information directly related to matters of public concern." (Citations omitted). . . . This Circuit has declined to get involved in deciding the newsworthiness of specific details in a newsworthy story where the details were "substantially related" to the story. (Citation omitted) (rejecting a challenge even where the media's use of certain material "reflected the media's insensitivity" and "embarrassed" the subject of the article). (487 F.3d at 251).

Thus, unlike the Eleventh Circuit, the Fifth Circuit has declined to become involved in editorial decisions as to newsworthiness.

A similar analysis was recently undertaken by the Tenth Circuit involving publication of highly sensitive material, in Anderson v. Suiters, 499 F.3d 1228 (10th Cir. 2007). There, an alleged rape victim brought an action against a television news reporter and others concerning the release to the media and the television airing of a videotape depicting her rape. The court noted in its ruling affirming summary judgment dismissing the claim, that state law torts involving media publication must take into account First Amendment restrictions therein, as set forth by this Court. This protects the right of the press to disseminate highly sensitive or embarrassing newsworthy information which can affect private individuals like the plaintiff therein, who had not sought publicity or consented thereto, where a legitimate subject of public interest becomes involved. 499 F.3d at 1235-36. In an extensive passage equally applicable to the instant case, and in sharp conflict with the philosophy of the Eleventh Circuit, the Tenth Circuit wrote:

> ...Anderson argues the videotape was highly personal and intimate in nature. While the sensitive nature of the material might make its disclosure highly offensive to a reasonable person, that does not make the videotape any less newsworthy so long as the material as a whole is substantially relevant to a legitimate matter of public concern.

> (Citation omitted). (noting that "[o]ther courts also appear to give 'public interest' status to news material on an aggregate basis, rather than itemizing what in the news report would qualify and what could remain private." (Citation omitted). (499 F.3d at 1236)

The Tenth Circuit duly noted that the plaintiff might find the public display of her case distressing, but since it would be difficult to say that there was no legitimate public interest therein, there could be no liability in that matter. 499 F.3d at 1237. There, the plaintiff was a living person who could assert a right of privacy.[7]

Anderson is similar to this Court's decision in The Florida Star v. B.J.F., 491 U.S. 524 (1989), reversing an award of damages against a newspaper which published the name of a living plaintiff rape victim in violation of a Florida statute proscribing such publication. The majority held that under the First Amendment, to avoid potential self-censorship, imposing liability for a newspaper's publication of truthful information otherwise lawfully obtained may be justified, if at all, "only when narrowly tailored to a state interest of the highest order" (491 U.S. at 541), not therein found.

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[7] Cf. Montana v. San Jose Mercury News, Inc. (1995) 34 Cal.App.4th 790, 793, dismissing privacy and publicity claims under California law by a famous professional football player as to posters of newspaper pages featuring his photograph and an artist's rendering of him ["no cause of action will lie for the publication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it."].

Here, the publication of nude, but non-obscene photographs of Nancy Benoit, originally posed by her with the intent to publish same, are part of a newsworthy article on her life and death and should not subject Petitioner, as publisher thereof, to liability under the Georgia right of publicity. To intrude on a decision to publish said photographs by the editors of *Hustler* magazine can only lead to a chilling effect on further publication by publishers of any private and/or embarrassing material of public interest concerning public figures and, indeed, would present a threat to the freedom of the press for the future.

CONCLUSION

Hustler magazine is an admittedly controversial publication not for everyone's taste. However, this Court has not hesitated to defend its First Amendment rights in the past. See, Hustler Magazine v. Falwell, 485 U.S. 46, 55 (1988) ["'Speech does not lose its protected character ... simply because it may embarrass others or coerce them into action' (citation omitted)"]. Here, the Eleventh Circuit's ruling below would cast a chilling effect on publishers in general if courts are to be allowed to act as "super editors" as to non-obscene photographs of public figures in connection with events of public interest.

For the reasons set forth above, from the opinions of this Court to the conflicting rulings of other circuits, the decision to publish lawful photographs of a public figure as part of a newsworthy article on her life and death should be

in the province of editors, and not of the courts. The First Amendment right of freedom of the press demands no less.

Dated: November 25, 2009

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 08-16148

D. C. Docket No. 08-00421-CV-TWT-1

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUNE 25, 2009
THOMAS K. KAHN
CLERK

MAUREEN TOFFOLONI,
as Administrator and Personal Representative
of the Estate of Nance E. Benoit,

Plaintiff-Appellant,

versus

LFP PUBLISHING GROUP, LLC,
d.b.a. Hustler Magazine,
MARK SAMANSKY, an individual,
DEFENDANTS X, Y, AND Z,
other distributors and sellers
of Hustler Magazine,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(June 25, 2009)

Before WILSON and ANDERSON, Circuit Judges, and GOLDBERG,* Judge.

WILSON, Circuit Judge:

This case involves the newsworthiness exception to the Georgia state law "right of publicity," which arises out of the constitutional right to privacy. The district court found that LFP Publishing Group, LLC's ("LFP") publication of twenty year old nude photographs of Nancy Benoit fell squarely within the newsworthiness exception. We reverse.

A. Background

Maureen Toffoloni is the mother and the administrator of the estate of Nancy Benoit. Benoit and her son, both Georgia residents, were murdered by her husband, Christopher Benoit, in June 2007. Christopher Benoit then committed suicide. Prior to her death, Benoit was a model and professional woman wrestler. Christopher Benoit was a well-known professional wrestler. Their deaths garnered a great deal of domestic and international media attention.

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* Honorable Richard W. Goldberg, United States Court of International Trade, sitting by designation.

Approximately twenty years before her death, Benoit posed nude for photographer Mark Samansky, who took both photographs and a video of her. Toffoloni alleges that, immediately after the shoot, her daughter asked Samansky to destroy the photographs and video and believed that Samansky had destroyed them. However, Samansky kept the video, from which he extracted nude and partially nude photographic stills of Benoit. Samansky conveyed the photographic stills to LFP, which published them in the March 2008 issue of *Hustler* magazine.

In February 2008, Toffoloni brought suit against LFP in Georgia state court, seeking to enjoin the publication of the photographs and seeking damages for violation of Benoit's right of publicity. LFP removed the case to the United States District Court for the Northern District of Georgia. On October 6, 2008, the district court granted LFP's motion to dismiss for failure to state a claim, concluding that "there is no dispute that Ms. Benoit's death was a 'legitimate matter of public interest and concern.' Therefore the publication of Ms. Benoit's nude photographs cannot be described as a mere commercial benefit for [LFP] - although [LFP] (like nearly all journalistic outlets) no doubt seeks to profit from its publications." *Toffoloni v. LFP Publ'g Grp.*, No. 1:08-CV-421-TWT, 2008 U.S. Dist. LEXIS 82287, at *6 (N.D. Ga. 2008). Toffoloni appealed to the United States Court of Appeals for the Eleventh Circuit.

B. The Right of Publicity Under Georgia Law

Georgia recognizes a right of publicity to protect against "the appropriation of another's name and likeness . . . without consent and for the financial gain of the appropriator . . . whether the person whose name and likeness is used is a private citizen, entertainer, or . . . a public figure who is not a public official." *Martin Luther King, Jr. Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697, 703 (Ga. 1982). "The right of publicity may be defined as [an individual's] right to the exclusive use of his or her name and likeness." *Id.* at 700 (citation omitted). Violation of the right of publicity is a state tort. *Id.* at 703. *See also Alonso v. Parfet*, 325 S.E.2d 152, 153 (Ga. 1985) ("The courts in this state have long recognized that one who makes an unsanctioned appropriation of another's name or likeness for his own benefit may be liable to that person in tort.") (citation omitted).

The right of publicity grew out of a long-standing recognition of the right to privacy under Georgia law. *See Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 69-81 (Ga. 1905). Rooted in the right to privacy, the right of publicity is also characterized by an economic concern that individuals be allowed to control the use of their image in order to maximize the profit they can receive from its publication. We will first discuss the privacy right underpinnings of the right of publicity and then turn to its economic element.

I. The Right to Privacy Underpinning the Right of Publicity

As the Supreme Court of Georgia has explained, "to each individual member of society there are matters private, and there are matters public so far as the individual is concerned." *Pavesich*, 50 S.E. at 69. "All will admit that the individual who desires to live a life of seclusion can not be compelled, against his consent, to exhibit his person in any public place, unless such exhibition is demanded by the law of the land." *Id.* at 70. Thus, "[t]he right of privacy within certain limits is a right derived from natural law, recognized by the principles of municipal law, and guaranteed to persons in [Georgia] by the constitutions of the United States and of the State of Georgia, in those provisions which declare that no person shall be deprived of liberty except by due process of law." *Id.* at 71.

Furthermore, "[o]ne who desires to live a life of partial seclusion has a right to choose the times, places, and manner in which and at which he will submit himself to the public gaze." *Id.* at 70. "The right to withdraw from the public gaze at such times as a person may see fit, when his presence in public is not demanded by any rule of law is also embraced within the right of personal liberty." *Id.* Importantly, the Supreme Court of Georgia has specifically held that, except as required by law, "the body of a person can not be put on exhibition at any time or at any place without his consent." *Id.*

Concern about the publication of private photographs of individuals without their consent fueled Samuel Warren's and Justice Louis Brandeis'

famous article, "The Right to Privacy," which was substantially relied upon by the Supreme Court of Georgia in *Pavesich*, when the court first recognized the right to privacy. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890); *Pavesich*, 50 S.E. at 74-75. Warren and Brandeis maintained as follows:

> Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right "to be let alone." Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the house-tops". . . . [t]he law must afford some remedy for the unauthorized circulation of portraits of private persons. . . .

Warren & Brandeis, 4 HARV. L. REV. at 195. Relying on Warren and Brandeis, the Supreme Court of Georgia sought to protect individuals from exhibition against their will by recognizing the right to privacy.

The tort of invasion of privacy protects the right "to be free from unwarranted publicity, . . . or the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs *with which the public had no legitimate*

concern." *Gouldman-Taber Pontiac, Inc. v. Zerbst*, 100 S.E.2d 881, 882 (Ga. 1957) (emphasis added) (internal quotation marks, citation, and alterations omitted). From this right to be free of the public's illegitimate gaze, Georgia extrapolated a right of publicity– a right to control if, when, and under what circumstances one's image is made public and subject to scrutiny.

Georgia first recognized the right of publicity in *Cabaniss v. Hipsley*, 151 S.E.2d 496 (Ga. Ct. App. 1966). The court held that the plaintiff, who was an exotic dancer, could recover from the Atlanta Playboy Club for its unauthorized use of her photograph in an entertainment magazine advertising the club. The court explained that "[u]nlike intrusion, disclosure, or false light, appropriation does not require the invasion of something secret, secluded or private pertaining to plaintiff, nor does it involve falsity. It consists of the appropriation, for the defendant's benefit, use or advantage, of the plaintiff's name or likeness. . . . The interest protected . . . is not so much a mental as a proprietary one, in the exclusive use of the plaintiff's name and likeness as an aspect of his identity." *Id.* at 503-4 (internal quotation marks and citations omitted). Since the right of publicity is a "proprietary" right, "the measure of damages is the value of the use of the appropriated publicity." *Martin Luther King*, 296 S.E.2d at 703.

Subsequent to *Cabaniss*, the Georgia courts have expanded the right of publicity to "recognize[] the rights of private citizens, as well as entertainers, not to have their names and photographs used for the financial gain of the user without their consent,

where such use is not authorized as an exercise of freedom of the press." *Id.* (citations omitted). Additionally, the Supreme Court of Georgia held "that the right of publicity survives the death of its owner and is inheritable and devisable." *Id.* at 705.

The Restatement (Second) of Torts, however, tempers the right of publicity, providing that:

> No one has the right to object merely because his name or his appearance is brought before the public, *since neither is in any way a private matter, and both are open to public observation.* It is only when the publicity is given for the purpose of appropriating to the defendant's benefit the commercial or other values associated with the name or the likeness that the right to privacy is invaded.

RESTATEMENT (SECOND) OF TORTS § 652C cmt. d (1977) (emphasis added). Thus, the Restatement clarifies that the right of publicity does not attach to that which is "open to public observation." *Id.* Accordingly, the right of publicity must attach to that which is not open to public observation and is appropriated for the commercial benefit of another.[1]

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[1] "It is not the manner in which information has been obtained that determines whether it is public or private. . . . The offense with which we are here involved is not the intrusion by means of which information is obtained; it is the publicizing of that which is private in character. The question, then, is whether the information disclosed was public rather than private – whether it was generally known and, if not, whether the disclosure . . . can be said to have been to the public at large." *Virgil v. Time, Inc.*, 527 F.2d 1122, 1126 (9th Cir. 1975) (citation omitted).

II. Economic Concerns Inherent in the Right of Publicity

The Supreme Court of the United States has underscored the economic concern inherent in recognition of a right of publicity. The Supreme Court considered the right of publicity in a case where a broadcasting company transmitted an entertainer's entire performance without his permission, essentially appropriating the entertainer's potential viewing audience. The Court held:

> [t]he rationale for [protecting the right of publicity] is the straightforward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.

Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 576, 97 S. Ct. 2849, 2857 (1977) (internal quotation marks and citation omitted). Thus, when a media outlet appropriates "some aspect" of an individual "that would have market value and for which he would normally pay," without that individual's permission, the media outlet is subject to damages in a tort suit for violation of the right of publicity. *Id.*

C. The "Newsworthiness" Exception to the Right of Publicity

The right to privacy and corresponding right of publicity are necessarily in tension with the First

Amendment's protection of freedom of speech and of the press. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." U.S. CONST. amend. I. Additionally, the Georgia state constitution provides that "[e]very person may speak, write, and publish sentiments on all subjects but shall be responsible for the abuse of that liberty." GA. CONST. art. I, § I, para. V. As the Supreme Court of Georgia has explained, "[t]he right preserved and guaranteed against invasion by the constitution is therefore the right to utter, to write, and to print one's sentiments, subject only to the limitation that in so doing he shall not be guilty of an abuse of this privilege by invading the legal rights of others." *Pavesich*, 50 S.E. at 73.

Both the rights to freedom of speech and freedom of the press, as guaranteed by the First Amendment, and the right to privacy, as guaranteed by the Due Process Clause, are fundamental constitutional rights. The Constitution directs no hierarchy between them. Thus, courts are required to engage in a fact-sensitive balancing, with an eye toward that which is reasonable and that which resonates with our community morals, in order to protect the Constitution as a whole.

In order to navigate between the competing constitutionally protected rights of privacy and publicity and the rights of freedom of speech and of the press, the Georgia courts have adopted a "newsworthiness" exception to the right of publicity. The Supreme Court of Georgia has held that "where an incident is a matter of public interest, or the subject matter of a public investigation, a

publication in connection therewith can be a violation of no one's legal right of privacy." *Waters v. Fleetwood*, 91 S.E.2d 344, 348 (Ga. 1956).

The Georgia Supreme Court has further distinguished commercial use from newsworthy use, stating that "[t]here is in the publication of one's picture for advertising purposes not the slightest semblance of an expression of an idea, a thought, or an opinion, within the meaning of the constitutional provision which guarantees to a person the right to publish his sentiments on any subject." *Pavesich*, 50 S.E. at 80. Accordingly, where a publisher may be precluded by the right of publicity from publishing one's image for purely financial gain, as in an advertisement, where the publication is newsworthy, the right of publicity gives way to freedom of the press.[2]

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[2] The Supreme Court of California has identified a number of factors to be considered when a court determines whether a particular fact qualifies as newsworthy.

> Among the factors to consider are the depth of the intrusion into the plaintiff's private affairs, the extent to which the plaintiff voluntarily pushed himself into a position of public notoriety . . . and whether the information is a matter of public record. . . . The weighing process continues in light of the circumstances prevailing at the time of publication.

Forsher v. Bugliosi, 608 P.2d 716, 727 (Cal. 1980). We agree that each of these factors is potentially relevant to determining whether the published fact could reasonably be considered newsworthy.

D. Analysis of LFP's Publication of the Nude Photographs

This case requires us to consider the nature and extent of the newsworthiness exception to the right of publicity. "It is in the determination of newsworthiness – in deciding whether published or broadcast material is of legitimate public concern – that courts must struggle most directly to accommodate the conflicting interests of individual privacy and press freedom." *Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 479 (Cal. 1998). Toffoloni argues that she should be allowed to sue for damages incident to the publication of nude pictures of her deceased daughter because those photographs were published against her express direction and were violative of her daughter's right of publicity. LFP responds that it published an article on the life, career, and tragic death of Benoit, which "includes comment on the modest beginnings of Ms. Benoit's career, and is accompanied by images of Ms. Benoit from that time." LFP argues that the article and related images are of substantial public interest and are therefore newsworthy.

Our resolution of this case commands an intensive review of both the relationship between the published photographs and the corresponding article, as well as the relationship between the published photographs and the incident of public concern – Benoit's murder. We review the district court's grant of LFP's motion to dismiss for failure to state a claim upon which relief can be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6), *de novo*. *Berman v. Blount Parrish & Co.*, 525 F.3d 1057, 1057 (11th Cir. 2008).

I. The Incidental Relationship Between the Article and Photographs

First, it seems clear that had LFP published the nude photographs of Benoit by themselves– i.e., without a corresponding news article– the publication would not qualify within the newsworthiness exception. The fact of Benoit's nudity is not in and of itself newsworthy. "While one who is a public figure or is presently newsworthy may be the proper subject of news or informative presentation, the privilege does not extend to commercialization of his personality through a form of treatment distinct from the dissemination of news or information." *Gautier v. Pro-Football, Inc.*, 107 N.E.2d 485, 488 (N.Y. 1952) (citations omitted). The nude photographs "impart[] no information to the reading public." *McCabe v. Vill. Voice, Inc.*, 550 F. Supp. 525, 530 (E.D. Pa. 1982). The photographs, by themselves, serve no "legitimate purpose of disseminating news . . . and needlessly expose[] aspects of the plaintiff's private life to the public." *Id.* (internal quotation marks and citations omitted). Indeed, people are nude every day, and the news media does not typically find the occurrence worth reporting.

Here, however, LFP published the photographs alongside a biographical piece on Benoit's career. The biographical piece, in and of itself, certainly falls within the newsworthiness exception. *See generally Hustler Magazine v. Falwell*, 485 U.S. 46, 108 S. Ct. 876 (1988). The question before us is whether a brief biographical piece can

ratchet otherwise protected, personal photographs into the newsworthiness exception.

As the Second Circuit has held, "it is appropriate for a court to consider whether the public interest aspect of the publication is merely incidental to its commercial purpose." *Titan Sports, Inc. v. Comics World Corp.*, 870 F.2d 85, 87-88 (2d Cir. 1989) (internal quotation marks and citation omitted). Although LFP argues that the photographs were illustrative of the substantive, biographical article included in *Hustler*, our review of the publication demonstrates that such is not the case. These photographs were not incidental to the article. Rather, the article was incidental to the photographs.

The magazine cover advertises "WRESTLER CHRIS BENOIT'S MURDERED WIFE NUDE." The table of contents lists "NANCY BENOIT Exclusive Nude Pics of Wrestler's Doomed Wife." Neither the cover nor the table of contents makes any reference to the accompanying article. The article is entitled "NANCY BENOIT Au Naturel: The long-lost images of wrestler Chris Benoit's doomed wife." The title and page frame, which reads "EXCLUSIVE PICS! EXCLUSIVE PICS!," comprise about one-third of the first page. A second third of the page is devoted to two nude photographs of Benoit. The final third of the page discusses Benoit's murder and her nude photo shoot, twice referencing her brief desire to be a model. The second page of the article is entirely devoted to photographs, displaying eight additional photographs of Benoit. The heart of this article was the publication of nude photographs– not the corresponding biography.

The *Martin Luther King, Jr., Center for Social Change* case is particularly relevant here. In that case, the Supreme Court of Georgia answered several certified questions about the existence and extent of the right of publicity under Georgia law in the context of whether the Martin Luther King, Jr., Center for Social Change, Inc. and Coretta Scott King, as administratrix of Dr. King's estate, possessed a right of publicity in Dr. King's image. *Martin Luther King*, 296 S.E.2d at 699. The plaintiffs argued that their right of publicity was violated when B&S Sales manufactured and sold a plastic bust of Dr. King without their permission. Although the opinion does not deal expressly with the "newsworthiness" exception to the right of publicity, the Supreme Court of Georgia specifically notes that B&S Sales offered a free biographical booklet detailing "the life of Dr. King entitled 'A Tribute to Dr. Martin Luther King, Jr.,'" alongside the bust. *Id.* at 698. The court did not conclude that the booklet rendered Dr. King's image, in and of itself, newsworthy. Rather, the opinion treats the existence of the booklet as irrelevant. The booklet was merely incidental to the bust. Without more, Dr. King's estate's right of publicity in his image could trump freedom of speech and the press.

We are convinced that the Supreme Court of Georgia would find similarly here. LFP's brief biography of Benoit's life, even with its reference to her youthful pursuit of modeling, is merely incidental to its publication of her nude photographs. Therefore, the biographical piece cannot suffice to render the nude photographs newsworthy.

II. Relationship of the Photographs to the Incident of Public Concern

Furthermore, we are convinced that the nude photographs are not connected to the incident of public concern. LFP would have us rule that someone's notorious death constitutes a carte blanche for the publication of any and all images of that person during his or her life, regardless of whether those images were intentionally kept private and regardless of whether those images are of any relation to the incident currently of public concern. We disagree.

The Georgia courts have never held, nor do we believe that they would hold, that if one is the victim of an infamous murder, one's entire life is rendered the legitimate subject of public scrutiny. Such a ruling would eviscerate the Georgia right of publicity, allowing the exception to swallow the rule. Rather, the Georgia courts have consistently indicated that there are timeliness or relatedness boundaries that circumscribe the breadth of public scrutiny to the incident of public interest.

For example, in *Tucker v. News Publishing Company*, 397 S.E.2d 499 (Ga. Ct. App. 1990), the court recognized that "through no fault of his own, [the] appellant [who had been attacked] became the object of public interest." *Id.* at 500 (internal quotation mark omitted). The attack itself "necessarily became a matter of legal investigation and the subject matter of public records." *Id.* Thus, the court concluded "*[d]uring the pendency and continuation of the investigation*, and until such time as the perpetrator[s] of the crime may be

apprehended and brought to justice under the rules of our society, the matter will continue to be one of public interest, and the dissemination of information pertaining thereto would not amount to a violation of [appellant's] right of privacy." *Id.* (internal quotation marks and citation omitted) (emphasis added). The court expressly envisioned outside boundaries to the realm of public scrutiny: "the matter [of] public interest" and the "time [that] the perpetrator[s] of the crime may be apprehended and brought to justice. . . ." *Id.* (internal quotation marks and citation omitted).

Similarly, in *Ramsey v. Georgia Gazette Publishing Company*, 297 S.E.2d 94, 96 (Ga. Ct. App. 1982), the court recognized that the "plaintiff has, albeit unwillingly, become an actor in a public drama." As such, "[d]issemination of information *pertaining to this drama* is no violation of the plaintiff's right of privacy." *Id.* (emphasis added). Correspondingly, we conclude that the Georgia courts would find that dissemination of information that does not pertain to the "drama" at hand *may* violate an individual's right of privacy. Although the Georgia courts have not said that public scrutiny is circumscribed solely to the details of the newsworthy event itself, the Georgia courts have required reasonable timeliness and relatedness boundaries.

When determining where such boundaries should be drawn, we are guided by the commentary on the permissible publicity of private facts in the Restatement (Second) of Torts. The Restatement recognizes that, although an individual may be rendered subject to public scrutiny by some newsworthy event, "[t]he extent of the authority to

make public private facts is not . . . unlimited." RESTATEMENT (SECOND) OF TORTS § 652D cmt. h. The Restatement concludes that even public figures, like actresses, may be "entitled" to keep private "some intimate details . . . such as sexual relations. . . ." *Id.* "The line is to be drawn when the publicity ceases to be the giving of information to which the public is *entitled*, and becomes a morbid and sensational prying into private lives for its own sake, *with which a reasonable member of the public, with decent standards, would say that he had no concern.*" *Id.* (emphasis added). The Restatement expounds that "[t]he limitations . . . are those of common decency, having due regard to the freedom of the press and its reasonable leeway to choose what it will tell the public, but also due regard to the feelings of the individual and the harm that will be done to him by the exposure." *Id.* Furthermore, "*[s]ome reasonable proportion is also to be maintained between the event or activity that makes the individual a public figure and the private facts to which publicity is given.*" *Id.* (emphasis added).

Here, the published nude photographs were in no conceivable way related to the "incident of public concern" or current "drama"– Benoit's death. The district court erred in its reliance upon *Waters v. Fleetwood*, 91 S.E.2d 344 (Ga. 1956), in which the Supreme Court of Georgia "found no actionable right when a defendant featured gratuitous, sensational photographs alongside a legitimate news article" to direct the dismissal of Toffoloni's claim. *Toffoloni*, No. 1:08-CV-421-TWT, at *6. In *Waters*, a newspaper published photographs of a murdered child's deceased body, as illustrative of an article about her murder and the subsequent investigation. Benoit's

situation is distinct from the situation in *Waters*. In *Waters*, the offensive photographs were of the child's deceased body, and as such were directly related to the "incident of public interest" – the child's death. LFP published photographs of Benoit that were at least twenty years old to correspond to a brief discussion about her aspiring career as a model. Those photographs had no relation to her death. Her aspiring nude modeling career at no time developed into an incident of public concern, and for good reason– Benoit sought the destruction of all of those images.

LFP may not make public private, nude images of Benoit that she, allegedly, expressly did not wish made public, simply because she once wished to be a model and was then murdered. "[W]hen a person is involuntarily involved in a newsworthy incident, not all aspects of the person's life, and not everything the person says or does, is thereby rendered newsworthy." *Shulman*, 955 P.2d at 484.

We agree with the Ninth Circuit that "[m]ost persons are connected with some activity, vocational or avocational, as to which the public can be said as a matter of law to have a legitimate interest or curiosity. To hold as a matter of law that private facts as to such persons are also within the area of legitimate public interest could indirectly expose everyone's private life to public view." *Virgil*, 527 F.2d at 1131.

Moreover, we are guided by the Tenth Circuit's conclusion that "[b]ecause each member of our society at some time engages in an activity that

fairly could be characterized as a matter of legitimate public concern, to permit that activity to open the door to the exposure of any truthful secret about that person would render meaningless the tort of public disclosure of private facts." *Gilbert v. Med. Econ. Co.*, 665 F.2d 305, 308 (10th Cir. 1981). We agree with the Tenth Circuit that the First Amendment "does not require such a result. Therefore, to properly balance freedom of the press against the right of privacy, *every private fact disclosed in an otherwise truthful, newsworthy publication must have some substantial relevance to a matter of legitimate public interest.*" *Id.* (emphasis added). *See also Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1232 (7th Cir. 1993) ("An individual, and more pertinently perhaps the community, is most offended by the publication of intimate personal facts when the community has no interest in them beyond the voyeuristic thrill of penetrating the wall of privacy that surrounds a stranger.").

The photographs published by LFP neither relate to the incident of public concern conceptually nor correspond with the time period during which Benoit was rendered, against her will, the subject of public scrutiny. The photographs bear no relevance– let alone "substantial relevance"– to the "matter of legitimate public interest." *Gilbert*, 665 F.2d at 208. On these facts, were we to hold otherwise, LFP would be free to publish any nude photographs of almost anyone without their permission, simply because the fact that they were caught nude on camera strikes someone as "newsworthy." Surely that debases the very concept of a right to privacy.

III. Economic Ramifications of LFP's Publication of the Photographs

Finally, we are guided by the Seventh Circuit's opinion in *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128 (7th Cir. 1985), to conclude that LFP may be held liable in damages for violation of the right of publicity when it published images of Benoit that had economic value without her permission– let alone without compensating her estate.

The *Douglass* case has many similarities to this case. Robyn Douglass posed nude for *Playboy* magazine and images from that shoot were published in *Playboy*. Later, *Hustler* ascertained other, previously unpublished photographs of Douglass from the photographer and published them in *Hustler* without Douglass' permission and without compensating her. *Hustler* published these images alongside biographical information about Douglass' acting career. Douglass brought suit seeking compensation for the violation of her right of publicity. Much like in this case, *Hustler* argued that Douglass was newsworthy and that "Robyn Douglass Nude" was fair comment on her career.

The Seventh Circuit disagreed:

> Robyn Douglass or her agents must have control over the dissemination of her nude photographs if their value is to be maximized. *Hustler* can run a story on her and use any photographs that are in the public domain or that it can buy but it cannot use photographs

> made by others for commercial purposes and (temporarily) withheld from public distribution.
>
> The unauthorized publication did impair the commercial exploitation of Douglass'[] talents, though probably not as much as she asserts and mainly because of where they were published. But an important aspect of the 'right of publicity' is being able to control the place as well as time and number of one's public appearances; for example, no celebrity sells his name or likeness for advertising purposes to all comers. In any event, Douglass was not paid by *Hustler* for the right to publish nude photos of her.

Id. at 1138-39 (citation omitted). Likewise, LFP has published photographs of Benoit in *Hustler* without the permission of her estate and without compensation and attempts to justify their publication as comment on her career.

Notably, the primary difference between Douglass' case and Benoit's case is that Benoit does not seem to have ever sought to have nude photographs of herself published. As stated by the Supreme Court of Georgia, "a person who avoids exploitation during life is entitled to have his image protected against exploitation after death just as much *if not more than* a person who exploited his image during life." *Martin Luther King*, 296 S.E.2d at 706 (emphasis added).

We agree with the Seventh Circuit that this "unauthorized publication" impaired "the commercial exploitation" of Benoit's image. Certainly, "an important aspect of the 'right of publicity' is being able to control the place as well as time and number of one's public appearances. . . ." *Douglass*, 769 F.2d at 1138. Crude though the concept may seem in this context, Toffoloni is entitled to control when and whether images of her daughter are made public in order to maximize the economic benefit to be derived from her daughter's posthumous fame.

D. Conclusion

These private, nude photographs were not incident to a newsworthy article; rather, the brief biography was incident to the photographs. Additionally, these photographs were neither related in time nor concept to the current incident of public interest. We hold that these photographs do not qualify for the newsworthiness exception to the right of publicity. Accordingly, we reverse and remand for further proceedings.

REVERSED AND REMANDED.

[ENTERED: October 6, 2008]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION FILE
NO. 1:08-CV-421-TWT

MAUREEN TOFFOLONI
as Administrator and Personal
Representative of the Estate of Nancy
E. Benoit,

Plaintiff,

v.

LFP PUBLISHING GROUP, LLC
doing business as Hustler Magazine, et ai.,

Defendants.

ORDER

This is an action seeking damages and injunctive relief arising out of the publication of nude photographs in Hustler Magazine. It is before the Court on the Defendant's Motion to Dismiss [Doc. 10] which is GRANTED.

1. Introduction

The Plaintiff is the mother of and the administrator of the estate of Nancy Benoit. Ms. Benoit, a Georgia resident, was the victim of a murder-suicide perpetrated by her husband

Christopher Benoit in June 2007. Defendant LFP Publishing Group publishes Hustler Magazine, a self-sty led "Gentlemen's Magazine." (Def.' s Mot. to Dismiss, at 1). The Defendant LFP alleges that it is a "Delaware corporation with its principal place of business located in the State of California." (Notice of Removal ¶ 4). Defendant Mark Samansky, who is not a party to this Motion, is alleged to be a citizen of Colorado.

Christopher Benoit was a well-known professional wrestler. Ms. Benoit achieved her own level of fame as "a model, professional woman wrestler and public figure." (Compl. ¶ 15).

Approximately twenty years ago, Ms. Benoit (then Nancy Daus) posed nude for Defendant Samanksy, a photographer. (Compl. ¶ 9). After Defendant Samansky took photographs and video of the shoot, the Plaintiff alleges that Ms. Benoit requested that Samansky destroy the materials. (Compl. ¶ 13). However, Samansky kept the video and made photographic stills from the video. (Compl. ¶ 16). The Defendant LFP eventually obtained the stills and published them in an article about the Plaintiff - in its March 2008 issue of Hustler Magazine. On February 4, 2008, the Plaintiff filed suit in the Superior Court of Fayette County, Georgia, seeking to enjoin the publication of the nude and semi-nude photographs in Hustler Magazine and seeking damages for violation of publicity. The case was removed to this Court, and this Court denied the Plaintiff's Motion for Temporary Restraining Order on February 8, 2008. The Defendant LFP Publishing now moves to dismiss.

II. Motion to Dismiss Standard

A complaint should be dismissed under Rule 12(b)(6) only where it appears that the facts alleged fail to state a "plausible" claim for relief. Bell Atlantic v. Twombly, 127 S. Ct. 1955, 1965-66 (2007); Fed. R. Civ. P. 12(b)(6). A complaint may survive a motion to dismiss for failure to state a claim, however, even if it is "improbable" that a plaintiff would be able to prove those facts and even if the possibility of recovery is extremely "remote and unlikely." Twombly, 127 S. Ct. at 1965 (citations and quotations omitted). In ruling on a motion to dismiss, the court must accept the facts pleaded in the complaint as true and construe them in the light most favorable to the plaintiff. See Quality Foods de Centro America, S.A. v. Latin American Agribusiness Dev. Corp., S.A., 711 F.2d 989, 994-95 (11th Cir. 1983); see also Sanjuan v. American Bd. of Psychiatry and Neurology, Inc., 40 F.3d 247, 251 (7th Cir. 1994) (noting that at the pleading stage, the plaintiff "receives the benefit of imagination"). Generally, notice pleading is all that is required for a valid complaint. See Lombard's, Inc. v. Prince Mfg., Inc., 753 F.2d 974, 975 (11th Cir. 1985), cert. denied, 474 U.S. 1082 (1986). Under notice pleading, the plaintiff need only give the defendant fair notice of the plaintiff's claim and the grounds upon which it rests. See Erickson v. Pardus, 127 S. Ct. 2197, 2200 (2007) (citing Twombly, 127 S. Ct. at 1964). The Supreme Court has rejected the "no set of facts" standard relied upon by the Plaintiff in opposing the Defendant's Motion to Dismiss. Twombly, 126 S. Ct. at 1969.

III. Discussion

The Defendant argues that there was no violation of publicity because the nude photographs were incident to a legitimate, timely news article concerning a matter of public interest. Georgia recognizes a right of publicity to protect against "the appropriation of another's name and likeness ... without consent and for the financial gain of the appropriator ... whether the person whose name and likeness is used is a private citizen, entertainer, or ... a public figure who is not a public official." Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Products, Inc., 250 Ga. 135, 143 (1982). The right of publicity grew out of a long-standing recognition of the right to privacy - "the Georgia Supreme Court became the first such court to recognize the right of privacy in Pavesich v. New England Life Ins. Co., 122 Ga. 190 (1905)." Martin Luther King, Jr., Center, at 138. An important limitation to the right of publicity is that it does not extend where the use is "authorized as an exercise of freedom of the press." Id.

The Plaintiff submits that the elements for a prima facie case for a violation of the right to publicity are: (1) a use of the owner's likeness or image; (2) used for the appropriator's commercial use or financial gain; and (3) done without the consent of the owner of the right. (Pl.'s Br. in Opp'n to Def.'s Mot. to Dismiss, at 8). Both parties agree that the key issue in this case is whether the publication of Ms. Benoit's nude photographs constituted a strictly commercial use.

The Plaintiff argues that the publication of unauthorized photographs can be a violation of a right to publicity. See Cabaniss v. Hipsley, 114 Ga. App. 367 (1966) (Atlanta Playboy Club subject to liability where it ran advertisement featuring unauthorized picture of exotic dancer, thus appropriating image for commercial exploitation). The Plaintiff also argues that the publication is not entitled to first amendment protection because the pictures were not incidental to the story, but rather were the story. "[T]he essence of Hustler's 'business' is publishing salacious, overtly nude and partially nude photographs of women .... [V]irtually the sole purpose of the magazine consists of commercial exploitation of the publication of nude photographs of women." (Pl.'s Br. in Opp'n to Def.'s Mot. to Dismiss, at 11).

However, there is no dispute that Ms. Benoit's death was a "legitimate matter of public interest and concern." (Pl.'s Br. in Opp'n to Def.'s Mot. to Dismiss, at 10). Therefore the publication of Ms. Benoit's nude photographs cannot be described as a mere commercial benefit for the Defendant - although the Defendant (like nearly all journalistic outlets) no doubt seeks to profit from its publications. The Georgia Supreme Court has previously found no actionable right when a defendant featured gratuitous, sensational photographs alongside a legitimate news article. Waters v. Fleetwood, 212 Ga. 161 (1956). In Waters, the plaintiff alleged a violation of privacy when photographs of her daughter's deceased body were published with a newspaper article concerning her death and subsequent investigation. Id. at 161-62. The court described the photographs as unsettling:

> These photographs were taken at close range, showing the gruesome effects of an atrocious crime, and displaying the dead body of the petitioner's child as an object of public curiosity. The photographs showed the decomposition of parts of the child's body, and showed it wrapped in chains.

Id. In addition to publishing the photographs with the newspaper article, the publisher also advertised and sold copies of the photographs. Id. at 162, 167. The court held that there was no violation of a right to privacy - even as to the reprinted photographs for sale separate from the newspaper article - because the death was a matter of legitimate public interest. Id. This holding provides a guidepost for what is "authorized as an exercise of freedom of the press," the exception carved from the right of publicity in Martin Luther King. "Were it otherwise, no newspaper might identify any person or any incident of his life without accounting to him for violation of his 'right to publicity'." Martin Luther King, Jr., Center, 250 Ga. at 151-52 (Weltner, J. concurring). The freedom of press exception to the right of publicity generally, combined with the Waters court's specific view of what is in the legitimate public interest, precludes a cause of action for violation of publicity rights in this case. The fact that the Court personally views publication of the photographs to be offensive and distasteful is not determinative.

IV. Conclusion

For the reasons set forth above, the Defendant's Motion to Dismiss [Doc. 10] is GRANTED.

SO ORDERED, this 3 day of October, 2008.

/s/Thomas W. Thrash
THOMAS W. THRASH, JR.
United States District Judge

[ENTERED: October 7, 2008]

Hinds, Terry

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Sent: Tuesday, October 07, 2008 8:47 AM

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Subject: Activity in Case 1:08-cv-00421-TWT Toffoloni v. LFP Publishing Group, LLC Terminated Case

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U.S. District Court

Northern District of Georgia

Notice of Electronic Filing

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Case Name: Toffoloni v. LFP Publishing Group, LLC
Case Number: 1:08-cv-421
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WARNING: CASE CLOSED on 10/06/2008
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1:08-cv-421 Notice has been electronically mailed to:

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1:08-cv-421 Notice has been delivered by other means to:

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[ENTERED: August 27, 2009]

IN THE UNITED STATES COURT OF

FOR THE ELEVENTH CIRCUIT

No. 08-16148-GG

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
AUGUST 27, 2009
THOMAS K. KAHN
CLERK

MAUREEN TOFFOLONI,
as Administrator and Personal Representative
of the Estate of Nance E. Benoit,

Plaintiff-Appellant,

versus

LFP PUBLISHING GROUP, LLC,
d.b.a. Hustler Magazine,
MARK SAMANSKY, an individual,
DEFENDANTS X, Y, AND Z,
other distributors and sellers
of Hustler Magazine,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: WILSON and ANDERSON, Circuit Judges, and GOLDBERG*, Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/
UNITED STATES CIRCUIT JUDGE

ORD-42

* Honorable Richard W. Goldberg, United States Court of International Trade, sitting by designation.

[ENTERED: October 7, 2008]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION FILE
NO. 1:08-cv-421-TWT

MAUREEN TOFFOLONI,

Plaintiff,

vs.

LFP PUBLISHING GROUP, LLC, et al.,

Defendant.

JUDGMENT

This action having come before the court, Honorable Thomas W. Thrash, Jr., United States District Judge, for consideration of Defendant's Motion to Dismiss, and the court having granted said motion, it is

Ordered and Adjudged that this action is hereby **dismissed**.

Dated at Atlanta, Georgia, this 7th day of October, 2008.

JAMES N. HATTEN
CLERK OF COURT

By: /s/
Deputy Clerk

Prepared, Filed, and Entered
in the Clerk's Office
October 7,2008
James N. Hatten
Clerk of Court

By: /s/
Deputy Clerk

[ENTERED: February 6, 2008]

IN THE SUPERIOR COURT OF FAYETTE COUNTY
STATE OF GEORGIA

Civil Action File No. _____

MAUREEN TOFFOLONI,
as Administrator and Personal
Representative of the ESTATE
OF NANCY E. BENOIT,

Plaintiff

v.

LFP PUBLISHING GROUP, LLC.,
d/b/a Hustler Magazine, MARK
SAMANSKY, an individual, and other
distributors and sellers of Hustler
Magazine, as Defendants X, Y, and Z,

Defendants.

VERIFIED COMPLAINT

COMES NOW Plaintiff Maureen Toffoloni, as Administrator of the Estate of Nancy E. Benoit, and files this Verified Complaint, seeking a Temporary Restraining Order, Permanent Injunction, and Damages against Defendants LFP PUBLISHING GROUP, LLC, d.b.a "Hustler Magazine," MARK SAMANSKY, and the other as yet unknown distributors and sellers of Hustler Magazine, and shows the Court as follows:

PARTIES, JURISDICTION, AND VENUE

(1)

Plaintiff Maureen Toffoloni is a resident of the State of Florida and is the duly appointed administrator and personal representative of the Estate of Nancy E. Benoit, deceased in Fayette County, Georgia. Prior to her untimely death, Nancy Benoit resided in Fayette County, Georgia.

(2)

Defendant LFP Publishing Group, LLC ("Defendant LFP") is a limited liability company organized under the laws of the State of Delaware and is doing business in the State of Georgia and Fayette County. Defendant LFP can be served with the Summons and Complaint in this case by second original. The Defendant LFP has indicated through counsel that it will acknowledge service. Defendant LFP is the publisher of "Hustler Magazine."

(3)

Defendant Mark Samansky is a resident of the State of Colorado. He can be served with the Summons and Complaint in this case by second original at his residence, 10820 Towerbridge Lane, Highlands Ranch, Colorado 80130. Defendant Samansky is the photographer who photographed and videotaped Nancy Benoit, formerly known as "Nancy Daus".

(4)

The unknown Defendants are persons, corporations or other business entities who

distribute or sell Hustler Magazine in Fayette County. The proper names of these Defendants will be added when their names are known to Plaintiff.

(5)

The Defendants are subject to jurisdiction in this Court and venue is proper in this Court pursuant to Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984).

FACTS

(6)

Plaintiff re-alleges and incorporates by reference all allegations set forth in Paragraphs (1) through (5) as if more fully set forth herein.

(7)

Hustler Magazine is a pornographic magazine, published frequently, upon information and belief, on a monthly basis. The majority of the content of each monthly magazine is graphic and sexual photographs of nude women.

(8)

The Defendants acting as "Hustler Magazine" intend to publish and sell, and have already published and sold in the so-called "March" issue of Hustler Magazine, nude and partially nude photographs of Nancy Benoit. Upon information and belief, Hustler Magazine intends to publish other photographs of Nancy Benoit if it is able to do so. "Exhibit A" to this Complaint, filed herewith under

seal, is a true and correct copy of the article and photographs of Nancy Benoit from the "March" issue of Hustler Magazine.

(9)

The photographs that Hustler Magazine intends to publish were created from a videotape made while Nancy Benoit, then known as Nancy Daus, was posing for photographs approximately 20 years ago.

(10)

Defendant Samansky was the photographer taking the photographs and videotape of Nancy Benoit. Nancy Benoit did not sign a "model's release" or otherwise consent to Mr. Samansky's use of her image for any purpose.

(11)

Nancy Benoit was aware that she was being videotaped by Mr. Samansky, but did not give permission to the photographer to use the videotape in any way. *See* Affidavit of James Daus ¶ 6, attached hereto as "Exhibit B."

(12)

After the photographic session was over, Nancy Benoit immediately decided she did not want to have the photographs published, and she refused to give the photographer permission to do so. *See* Affidavit of James Daus ¶ 7.

(13)

Nancy Benoit and her then husband, James Daus, insisted that the photographer immediately destroy all photographs of her. Defendant Samansky represented to Nancy Benoit and her then husband, James Daus, that all photographs and the videotape had been destroyed by him. Nancy Benoit believed that all photographs and videotape of her had been destroyed within a short time after they were made. *See* Affidavit of James Daus, ¶ 8.

(14)

Nancy Benoit did not want to have nude or partially nude photographs of herself published by Mr. Samansky, or anyone else. *See* Affidavit of Jim Daus, ¶ 9.

(15)

Until Nancy Benoit's untimely death in June 2007, Nancy had a career as a model, professional woman wrestler and public figure. Nancy Benoit exploited her image for commercial purposes. The Estate of Nancy Benoit has the legal right to control use of Nancy's image for commercial and/or financial gain.

(16)

Upon information and belief, Defendant Samanksy lied to Nancy and James Daus and did not destroy the videotape of Nancy Benoit. Defendant Samansky apparently created still photographs from the videotape. Upon information and belief, Defendant Samansky and/or the

Defendant LFP currently have possession of the videotape and photographs.

(17)

Without Nancy's permission, Defendant Samansky sold the photographs and/or still images from the videotape to the Defendant LFP d/b/a Hustler Magazine for publication. Plaintiff does not know the amount of money that changed hands between Hustler Magazine and Mark Samansky.

(18)

On January 16, 2008, Counsel for Plaintiff sent a letter to Hustler Magazine requesting that Hustler refrain from publishing the photographs because publication of the photographs would be a violation of Nancy Benoit's right of publicity. A true and correct copy of that letter is attached hereto as "Exhibit C."

(19)

On January 25, 2008, counsel for Defendant LFP responded to counsel for Plaintiff indicating that Hustler denied Plaintiff's request and intended to publish nude and partially nude photographs in its March issue. Defendant LFP claims, in that letter, that publication of the photographs of Nancy Benoit is authorized as an exercise of freedom of the press "[t]he photographs of Ms. Benoit as a beautiful young woman in her twenties are being used to illustrate a legitimate and serious news article ... about her life." A true and correct copy of that letter is attached hereto as "Exhibit D".

(20)

Defendant LFP's publication of the photographs is not authorized as an exercise of the freedom of the press because publication of nude and partially nude photographs of Nancy Benoit are not necessary or relevant to a "legitimate and serious news article."

(21)

Hustler Magazine has already begun disseminating photographs of Nancy Benoit and advertising the nude images to its customers. Wrestle Zone, an online wrestling enthusiast website, contains a fan posting about the upcoming "March" issue of Hustler Magazine and a link to other photographs of Nancy Benoit. A print out of the Wrestle Zone posting is attached hereto as "Exhibit E".

COUNT 1: **PETITION FOR TEMPORARY RESTRAINING ORDER**

(22)

Plaintiff re-alleges and incorporates by reference all allegations set forth in Paragraphs (1) through (21) as if more fully set forth herein.

(23)

If the photographs of Nancy Benoit are published, Plaintiff will be immediately and irreparably harmed, in that the photographs cannot be unpublished. Once they are published, the public will always be able to see them.

(24)

Among other legal matters, Plaintiff intends to file a wrongful death action in this Court on behalf of the Estate of Nancy Benoit concerning the murders of Nancy Benoit and her minor child Daniel Benoit. If the photographs are published, Plaintiff will be immediately and irreparably harmed because the photographs may be seen by, and unfairly influence, the potential venire for the wrongful death case.

(25)

Monetary damages are inadequate to remedy the harm to Plaintiff.

COUNT 2: PETITION FOR PERMANENT INJUNCTION

(26)

Plaintiff re-alleges and incorporates by reference all allegations set forth in Paragraphs (1) through (25) as if more fully set forth herein.

(27)

Publication of the photographs would constitute a violation of Nancy Benoit's right of publicity, which may be enforced by her estate.

(28)

No adequate remedy at law exists if Hustler Magazine is permitted to publish or continue to publish the photographs of Nancy Benoit.

COUNT 3: CLAIM FOR DAMAGES

(29)

Plaintiff re-alleges and incorporates by reference all allegations set forth in Paragraphs (1) through (28) as if more fully set forth herein.

(30)

In the alternative, the Defendants have already published and sold photographs of Nancy Benoit so as to exploit her image for their own commercial purposes. Defendants are liable to Plaintiff for actual and punitive damages for violation of Nancy Benoit's right of publicity in an amount to be determined by a jury. Defendants are also liable to Plaintiff for attorney fees and expenses of litigation pursuant to O.C.G.A. §13-6-11.

WHEREFORE, Plaintiff respectfully prays as follows:

(a) that the Court timely hear oral argument from Plaintiff on the application for Temporary Restraining Order;

(b) that the Court issue a Temporary Restraining Order preventing Defendant LFP Publishing Group, LLC and Hustler Magazine from publishing photographs of Nancy Benoit;

(c) that the Court issue a Permanent Injunction preventing Defendant LFP Publishing Group, LLC and Hustler

Magazine from publishing photographs of Nancy Benoit; and

(d) that the Court grant Plaintiff such other and further relief as is just and proper, including actual and punitive damages, all costs of this litigation, and attorneys fees pursuant to O.C.G.A. § 13-6-11.

Respectfully submitted this 4th day of February, 2008.

/s/ Richard P. Decker
Richard P. Decker
State Bar of Georgia No. 215600
DECKER, HALLMAN, BARBER & BRIGGS
Attorneys for Plaintiff Maureen Toffoloni

260 Peachtree Street, N.W.
Suite 1700
Atlanta, Georgia 30303
(404) 522-1500

IN THE SUPERIOR COURT OF FAYETTE COUNTY
STATE OF GEORGIA

Civil Action File No. _____

MAUREEN TOFFOLONI,
as Administrator and Personal
Representative of the ESTATE
OF NANCY E. BENOIT,

Plaintiff

v.

LFP PUBLISHING GROUP, LLC.,
d/b/a Hustler Magazine, MARK
SAMANSKY, an individual, and other
distributors and sellers of Hustler
Magazine, as Defendants X, Y, and Z,

Defendants.

VERIFICATION

Personally appeared before me an officer duly authorized by law to administer oaths, MAUREEN TOFFOLONI, as Administrator and Personal Representative of the Estate of Nancy E. Benoit who, after being sworn, deposes and states that she has read the foregoing Complaint, and that the facts and allegations contained therein are true and correct to the best of her knowledge.

/s/ Maureen Toffoloni
MAUREEN TOFFOLONI

Sworn to and subscribed before me
this 31 day of Jan, 2008.

/s/ Toni V. Tamm
Notary Public (Affix Seal and Expiration Date)

Toni V. Tamm
Commission # DD370220
Expires December 5, 2008
Bonded Troy Fain – Insurance, Inc. 800-385-7019

EXHIBIT B

IN THE SUPERIOR COURT OF FAYETTE COUNTY
STATE OF GEORGIA

Civil Action File No. _____

MAUREEN TOFFOLONI,
as Administrator and Personal
Representative of the ESTATE
OF NANCY E. BENOIT,

Plaintiff

v.

LFP PUBLISHING GROUP, LLC.,
d/b/a Hustler Magazine, MARK
SAMANSKY, an individual, and other
distributors and sellers of Hustler
Magazine, as Defendants X, Y, and Z,

Defendants.

AFFIDAVIT OF JAMES DAUS

STATE OF FLORIDA

Personally appeared before me, the undersigned officer duly authorized by law to administer oaths, JAMES DAUS, who, after being duly sworn, deposes and states as follows:

(1)

My name is James Daus. I am over the age of 18. I have personal knowledge of the facts stated herein and know them to be true.

(2)

I give this Affidavit in support of Plaintiff's Complaint and Application for a Temporary Restraining Order and Permanent Injunction against Defendant LFP Publishing Group, LLC.

(3)

From 1981 to 1986, I was the husband and business partner of Nancy Benoit who was known at the time as Nancy Daus. I acted as the manager and promoter of her career during that time.

(4)

I am aware that Hustler Magazine has published and/or intends to publish nude and/or partially nude photographs of Nancy Benoit. I understand that these photographs were created from a videotape taken while Nancy Benoit posed for photographs approximately twenty-five years ago for a photographer named Mark Samansky.

(5)

I was present at all times when Nancy Benoit posed for photographs by Mr. Samansky. This took place in Florida in the Summer of 1983.

(6)

Nancy Benoit and I were aware that Mr. Samansky was videotaping her while also taking still photographs, but neither Nancy or I ever gave permission to Mr. Samansky to use the videotape in any way.

(7)

As soon as the photographs were taken, Nancy and I immediately decided she did not want to have the photographs published. Neither Nancy or I gave Mr. Samansky permission to use the photographs or any videotape in any way.

(8)

Nancy Benoit and I insisted that the photographer, Mr. Samansky, immediately destroy all photographs of her. Mr. Samansky told us that all photographs and the videotape had been destroyed. Nancy Benoit and I believed that all photographs and the videotape of her had been destroyed.

(9)

I know of my own knowledge that Nancy Benoit did not want to have nude or partially nude photographs of herself published at any time. I know of my own knowledge that she never gave Mr. Samansky the authority to use any photographs or videotapes of her for any purpose.

FURTHER AFFIANT SAYETH NOT.

/s/ James Daus
JAMES DAUS

Sworn to and subscribed before me
This 31st day of January, 2008.

/s/ Carol Grach
Notary Public

CAROL GRACH
Comm # DD0521696
Expires 2/22/2010
Bonded thru (800) 432-4254
Florida Notary Assn., Inc

EXHIBIT C

DECKER, HALLMAN, BARBER & BRIGGS
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

RICHARD P. DECKER*
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* also admitted in
Virgin Islands

January 16, 2008

Mr. Sean Berries
Custodian of Records
LFP Internet Group, LLC
LFP Video Group, LLC
8484 Wilshire Blvd.
Beverly Hills, CA 90211

Mr. David Carillo
Custodian of Records
LFP Publishing Group, LLC
8484 Wilshire Blvd.
Beverly Hills, CA 90211

Re: Nancy Toffoloni Benoit

Gentlemen:

This firm represents Maureen Toffoloni, the Administrator of the Estate of Nancy Toffoloni Benoit, who died in June of 2007.

It has come to our attention that your website, Hustler magazine, or a related publication or entity

intends to publish nude or partially nude photographs of Nancy Benoit. These photographs were apparently made years ago, under suspicious circumstances, leading us to question the legal propriety of same.

The purpose of this letter is to advise you of our client's strenuous objection to your publication of any photographs depicting the likeness of Nancy Benoit.

The estate of Nancy Benoit, represented by our client Maureen Toffoloni, would have legal title and any copyright to any likeness of Nancy Benoit. Your use of the likeness of Nancy Benoit in any form is expressly prohibited, unauthorized, and denied. *See* Martin Luther King, Jr. Center for Social Change, Inc. v. American Heritage Products, Inc., 250 Ga. 135 (1982).

Please advise the undersigned within 10 days of this letter that the publications or entities you represent will refrain from the publication of any photographs or likenesses of Nancy Benoit. If we do not hear from you within 10 days, we will assume that you intend to go forward with publication of this material, and will file suit in a Georgia court to prevent it. *See* Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984).

Please be governed accordingly.

Yours very truly,

Richard P. Decker

For DECKER, HALLMAN, BARBER & BRIGGS

RPD:mla

EXHIBIT D

Lipsitz Green Scime Cambria LLP

42 Delaware Avenue, Suite 120,
Buffalo, New York 14202-3924
P 716 849 1333 F 716 855 1580 (Not for service)
www.lglaw.com

January 25, 2008

Via UPS Overnight

Richard P. Decker, Esq.
Decker, Hallman, Barber & Briggs
Attorneys at Law
260 Peachtree Street, N.W.
Suite 1700
Atlanta, GA 30303

Re: Nancy Toffoloni Benoit Photographs

Dear Mr. Decker:

This firm is retained counsel for LFP Publishing Group, LLC ("LFP"), the publisher of *Hustler Magazine*. We have been asked to respond to your letter to LFP dated January 16, 2008 with regard to the publication of nude and partially nude photographs of the late Nancy Benoit. We understand that in this matter, you are representing Maureen Toffoloni and/or the Estate of Nancy Benoit.

In said letter, you protest the publication by *Hustler Magazine* of said photos of Nancy Benoit, and

demand that *Hustler* agree not to publish same. On behalf of LFP and *Hustler*, we must respectfully deny your request.

In your letter, you first indicate that your client would have legal title in any copyright to a likeness of Nancy Benoit. This contention is erroneous. The copyright in the photographs belongs to the photographer/videographer who originally took the pictures as their author pursuant to the United States Copyright Act, 17 U.S.C. § 101 *et seq*. Here, LFP is informed that the subject photographs were images made from a motion picture video, for which Nancy Benoit clearly and voluntarily posed. LFP has obtained the permission of the copyright holder to publish said photographs, and therefore your client has no copyright claim herein.

You further assert that any use of the likeness of Nancy Benoit is "prohibited, unauthorized, and denied," citing Martin Luther King, Jr. Center for Social Change, Inc. v. American Heritage Products, Inc., 250 Ga. 135 (1982), and that unless *Hustler* agrees not to so publish, you will file suit in a Georgia court, citing Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984).

The Supreme Court's Keeton decision concerns personal jurisdiction, statutes of limitations, and related procedural issues, rather than substantive rights. It is accordingly not relevant to this response. The substantive opinion of the Georgia Supreme Court in the King case is relevant, but does not serve to support your client's position.

As you are aware, the recent tragic death of Nancy Benoit, apparently murdered by her husband in their home, made national headlines in the newspapers, and was extensively covered by both network and cable television news shows. Aside from her husband Chris, Nancy herself had been a popular personality in the wrestling world, and was well-known by the national wrestling organizations and wrestling fans throughout the country. She was accordingly a public figure and celebrity, and her gruesome death was unquestionably of great public interest. Accordingly, Georgia, the State of her domicile, would afford her a right of publicity, not to have her name or photograph used "for the financial gain of the user without [her] consent, where such use is not authorized as an exercise of freedom of the press." 250 Ga. at 143.

Here, there is no such violation of Nancy Benoit's right of publicity by publication of her likeness in *Hustler Magazine*. The photographs of Ms. Benoit as a beautiful young woman in her twenties are being used to illustrate a legitimate and serious news article in the Magazine on her life, including her early career, her attempts at modeling, her various marriages, and her attempts to pose for *Penthouse Magazine*. Thus, we are not dealing with a commercial exploitation of Ms. Benoit's image for monetary gain, but as part of a legitimate news story. Such use by *Hustler Magazine* is clearly authorized and protected by the First Amendment to the United States Constitution, as is expressly recognized by the Georgia Supreme Court in its King decision. Such lawful publication of photos of a deceased public figure in a matter of public interest

is sharply contrasted with the clearly unauthorized and unlawful appropriation of the property rights in a decedent's image for commercial exploitation, as was seen in the facts of the King case. Recognizing the First Amendment right of publication by a free press in matters of public interest, as opposed to mere advertisements or commercial use, the Georgia Supreme Court in King itself acknowledged the press' right of free expression in this country.

To the extent that your client may attempt to assert some kind of "privacy" right in the images of Nancy Benoit, privacy rights are designed to protect values of human dignity. However, it is long-established law that such privacy rights end with the death of the person whose privacy was allegedly invaded.

To summarize, your client does not own any copyright interest in the photographs of Nancy Benoit, and the use of her photographs in connection with a legitimate news article of public interest in *Hustler Magazine* does not afford any right of publicity, and would otherwise be precluded by the freedom of the press contained in the First Amendment.

While we certainly sympathize with your client's grief as to the senseless murder of Nancy Benoit, *Hustler Magazine* has every legal right to publish said photographs as part of a legitimate news article on her life and death, as a matter of substantial public interest.

Sincerely,

LIPSITZ GREEN
SCIME CAMBRIA LLP
Attorneys for
Hustler Publishing Group, LLC

By: /s/ Paul J. Cambria, Jr., Esq.
Paul J. Cambria, Jr., Esq.

PJC/WMF/lv

F:/ADULT/11740/0964/08c/Deck0125

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EXHIBIT E

Nancy Benoit XXX Rated Photos To Appear In Hustler Magazine

12/27/2007 by Ryan Clark

LTrott3 sent this one in:

The upcoming issue of Hustler magazine (March 2008) has a two page spread of no photos of the late Nancy Benoit. Apparently these images are from when she was married to Jim Daus. Apparently she was touring doing bikini and wet t-shirt competitions in Florida when one of the hosts told her she should be in Penthouse. He set up a photo shoot for her and then videotaped the photo shoot. Nancy never submitted the photos and later had them destroyed but either never knew about or got the video which is now in the possession of Hustler.

It is the March 08 issue of Hustler magazine with a headline on the cover. I have a subscription so I got my issue in advance, I don't think it is on the newsstands yet as I live in LA and I haven't seen it there yet. Actually if you can get a hold of the Feb 2008 issue, there is an ad for it in the "Coming Next Month" section

http://wrestlezone.com/article.php?articleid=200809385

1/29/08

Supreme Court, U.S.
FILED
JAN 22 2010
OFFICE OF THE CLERK

No. 09-625

In The
Supreme Court of the United States

LFP PUBLISHING GROUP, LLC, DBA HUSTLER MAGAZINE,
Petitioner,

v.

MAUREEN TOFFOLONI, AS ADMINISTRATOR AND PERSONAL REPRESENTATIVE OF THE ESTATE OF NANCY E. BENOIT,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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January 22, 2010

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QUESTION PRESENTED

Should the Court grant certiorari to review the United States Court of Appeals for the Eleventh Circuit's *en banc* denial of Appellant's Request for Rehearing and *En Banc* Review of the panel's opinion where there is no compelling reason to review the opinion, where there is no conflict of authority, where no undecided federal question exists, and where the thrust of Petitioner's argument is that the Eleventh Circuit misapplied settled law to the particular facts of this case?

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BRIEF OF RESPONDENT IN OPPOSITION

Maureen Toffoloni, as Administrator and Personal Representative of the Estate of Nancy E. Benoit, Plaintiff-Respondent, requests that the Court deny the Petition for a Writ of Certiorari seeking review of the decisions of the United States Court of Appeals for the Eleventh Circuit in this case.

INTRODUCTION/COUNTER STATEMENT

A concise summary of the background of this case was provided in the Eleventh Circuit Opinion below:

> Maureen Toffoloni is the mother and the Administer of the Estate of Nancy Benoit. Benoit and her son, both Georgia residents, were murdered by her husband, Christopher Benoit, in June, 2007. Christopher Benoit then committed suicide. Prior to her death, Benoit was a model and professional woman wrestler. Christopher Benoit was a well-known professional wrestler. Their deaths garnered a great deal of domestic and international media attention.
>
> Approximately twenty years before her death, Benoit posed nude for photographer Mark Samansky, who took both photographs and a video of her. Toffoloni alleges that, immediately after the shoot, her daughter asked Samansky to destroy the photographs and video and believed that Samansky had destroyed them. However, Samansky kept the video, from which he extracted nude and partially nude photographic stills of Benoit. Samansky

> conveyed the photographic stills to LFP, which published them in the March 2008 issue of *Hustler* magazine.

Toffoloni v. LFP Publishing, 572 F.3d 1201, 1204 (11th Cir. 2009).

In February 2008, Toffoloni filed suit against LFP (hereinafter "Hustler") in Georgia state court seeking damages for violation of Benoit's right of publicity. The case was removed to the United States District Court for the Northern District of Georgia, where the court granted Hustler's motion to dismiss for failure to state a claim. On appeal, the Eleventh Circuit reversed and also denied Hustler's request for rehearing and for *En Banc* review.

The Eleventh Circuit reviewed Georgia law and its common law right of publicity, which arises out of the constitutional rights to privacy. *Id.* In so doing, the Eleventh Circuit recognized that the rights of publicity and privacy protect against "the unwarranted publicity, ... or the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs *with which the public had no legitimate concern.*" *Id.* at 1204, 1206 (emphasis in original) (noting the tort "does not require the invasion of something secret, secluded or private pertaining to plaintiff, nor does it involve falsity It consists of the appropriation for the defendant's benefit, use or advantage of the plaintiff's name or likeness.... The interest protected ... is not so much a mental as a proprietary one, in the exclusive use of the plaintiff's name and likeness as an aspect of his identity").

Due to the nature of the right, however, the Eleventh Circuit also recognized that in certain circumstances, there is a conflict between the freedoms of speech and press guaranteed by the First Amendment and the right to privacy, guaranteed by the Due Process clause. In order to navigate between the competing, constitutionally protected rights of privacy and publicity and the rights of freedom of speech and press, therefore, Georgia adopted a "newsworthiness" exception to the right of publicity. Accordingly, the Eleventh Circuit noted that "[i]t is in the determination of newsworthiness – in deciding whether published or broadcast material is of legitimate public concern – that courts must struggle most directly to accommodate the conflicting interests of individual privacy and press freedom." *Id.* at 1208 (quoting *Shulman v. Group W Prods., Inc.*, 18 Cal 4th 200 (1998)). The court concluded that "courts are required to engage in a *fact-sensitive balancing*, with an eye toward that which is reasonable and that which resonates with our community morals, in order to protect the Constitution as a whole." *Id.* at 1207-1208 (emphasis added).

After balancing the facts alleged in Respondent's complaint, the court found that the complaint stated a viable claim under the Georgia common law tort of right of publicity. Specifically, the court held that because Hustler's focus was on the nude photographs of Nancy Benoit, which were wholly unrelated to a matter of legitimate public interest – her murder at the hands of her husband decades after the photographs were taken - they did not qualify for the newsworthiness exception to the right of publicity. *Id* at 1213.

Ultimately, this case is quite simple. *Hustler* Magazine, without authorization, and without compensation, published twenty-year-old nude photographs of Nancy Benoit and profited as a result. Under Georgia's right of publicity, Plaintiff is entitled to damages unless the published photographs were newsworthy. Determination of newsworthiness required the Eleventh Circuit to conduct a detailed "fact sensitive balancing" of the allegations in the complaint. Following that analysis, the panel concluded that the photos were not newsworthy. The law is settled in Georgia and across the country. In all privacy cases where the newsworthiness exception is at issue, courts necessarily must evaluate and analyze the facts and allegations to determine if the published material is "of legitimate public concern."

As discussed more fully below, because there is no conflict of authority, nor is there an undecided federal question at issue, the arguments raised by Hustler and by *amici curiae* fail to satisfy the criteria established by the Court for what makes a case worthy of review. Thus, the Petition should be denied.

ARGUMENTS FOR DENYING THE WRIT

I. None of the Criteria of Supreme Court Rule 10 Have Been Asserted in the Petition and None Apply.

Supreme Court Rule 10[1] provides practitioners with the only formal road map to the issues and factors that make a case worthy of consideration by the Court. It is remarkable, though understandable, that nowhere

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[1] Rule 10 Considerations Governing Review on Writ of Certiorari Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter, has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power,
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals,
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law

in its Petition does Hustler mention Rule 10 or even acknowledge the Rule's existence. The Rule is ignored by *amici curiae* as well.[2]

Understanding that the grant or denial of a petition for a writ of certiorari is within the discretion of the Court and recognizing that the considerations governing review as set forth in Rule 10 are "neither controlling nor fully measure the Court's discretion," the Rule provides that a petition "will be granted only for compelling reasons." Hustler has failed to identify any compelling reasons for granting its Petition and there simply are none.

As Justice Harlan stated fifty years ago while delivering the Benjamin N. Cardozo lecture to the New York City Bar Association, "a great many petitions for certiorari reflect a fundamental misconception as to the role of the Supreme Court." JUSTICE HARLAN, *Manning the Dikes*, 13 RECORD OF THE NYC BAR ASS'N. 541, 549 (1958) A review of Hustler's questions presented attests to the accuracy of Judge Harlan's

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[2] *Amicus curiae* First Amendment Lawyers Association ("FALA") timely requested consent to submit a brief in support of review. Because, at the time of the request, FALA was unable to identify other amici that might join the brief, consent was denied Thus, FALA included a motion for leave to file a brief in its brief *Amici curiae* The Reporters Committee for Freedom of the Press and The Society for Professional Journalists notified respondent of their intent to file a brief in support of the Petition just six days before the brief was due Because the request for consent was untimely, it was denied Nevertheless, a brief was filed but, contrary to Supreme Court Rule 37 2(b), the brief did not include a motion for leave to file the brief For that reason, and because the brief is redundant for the most part, it will only be considered here in passing

comment, as such review reveals that Hustler is simply displeased with the way the Eleventh Circuit decided the case. In petitioning for certiorari, however, a petitioner must do more than merely assert that the decision below was wrong. As confirmed by Rule 10, the United States Supreme Court is not a court of error – it does not intervene when a petitioner asserts error in a lower court's factual findings or the misapplication of a properly stated rule of law. Yet that is exactly what Hustler asserts in its Petition.

Rule 10 outlines three well-established grounds for granting certiorari: (1) cases raising a federal law question on which a conflict has developed among the federal circuits or state supreme courts; (2) cases in which the lower court reached a decision in conflict with governing Supreme Court precedent; and (3) cases squarely presenting an important issue of federal law with significant practical consequences. Hustler's Petition fails to satisfy any of these grounds, is utterly without merit, and should be denied. *See* WILLIAM J. BRENNAN, JR., *The National Court of Appeals: Another Dissent*, 40 U. Chi L. Rev. 473, 476-78 (1973) (Justice Brennan opines that about 90 percent of IFP and 60 percent of paid petitions are so "utterly without merit" as to require a "minimum amount of time and effort" to determine that denial is the proper disposition).

A. Notwithstanding Suggestions by Hustler and *Amici*, There Are No Conflicting United States Courts of Appeal Decisions Regarding the Questions Posed by Petitioner Nor Is the Eleventh Circuit's Opinion in Conflict with Any Decision of This Court.

From a surface review of Hustler's assertions it may appear that the Eleventh Circuit's opinion in this case is contrary to the precedents of other Circuits.[3] That is not the case, however. There are no conflicts between the decisions of other United States Courts of Appeals or state courts of last resort that require this Court to exercise its supervisory power. Chief Justice Rehnquist once wrote that for a case to be worthy of review by the Court, it should involve "*unsettled* questions of federal, constitutional or statutory law of general interest." CHIEF JUSTICE REHNQUIST, *The Supreme Court – How It Was, How It Is*, at 269 (1987) (emphasis added). Although Hustler and *amici* suggest otherwise, there are no unsettled questions presented here.

As will be seen, the Eleventh Circuit's opinion is directly in line with its sister Circuits. Specifically, the Second, Fifth, Seventh, and Tenth Circuits have similarly held that in order to properly balance

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[3] Hustler asserts in its heading on page 13 of its Petition that "[t]he Eleventh Circuit's opinion is contrary to the precedents of this Court and other Circuits declaring that under the First Amendment Right of Freedom of the Press, the 'newsworthiness' of nude photographs of a murdered public figure used to illustrate a magazine article of public interest on Decedent's life and death is to be determined by the publisher, not the courts."

freedom of the press against the right of privacy, every private fact disclosed in an otherwise truthful, newsworthy publication must have some substantial relevance to a matter of legitimate public interest. *Toffoloni v. LFP Publishing*, 572 F.3d 1201, 1212 (11th Cir. 2009) (quoting *Gilbert v. Med. Econ. Co.*, 665 F.2d 305, 308 (10th Cir. 1981)), *see also Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1232 (7th Cir. 1996) (holding "[a]n individual, and more pertinently perhaps the community, is most offended by the publication of intimate personal facts when the community has no interest in them beyond the voyeuristic thrill of penetrating the wall of privacy that surrounds a stranger"); *Titan Sports, Inc. v. Comics World Corp.*, 870 F.2d 85, 87-88 (2d Cir. 1989) (holding "it is appropriate for a court to consider whether the public interest aspect of the publication is merely incidental to its commercial value).

Hustler (and *amici*) separately and subtly assert that there is some pertinent split of authority among the Circuits or that the Eleventh Circuit opinion was somehow contrary to decisions of this Court. Hustler says that the opinion conflicts with "precedents of this Court and other Circuits" which permit the publisher – not the courts – to determine what is newsworthy.[4] *Amici* argue that different standards for determining newsworthiness have been announced by several circuits. The assertions are without merit.

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[4] Oddly, amici acknowledge the prerogative of *the courts, not the publisher*, to pass on the newsworthiness of published material

i) The Cases Cited by Hustler Do Not Cede the Determination of Newsworthiness to the Publisher.

Hustler argues that newsworthiness of published material "is to be determined by the publisher, not the courts." Petition at 13. Yet, no case decided by this or any other court supports that notion. No doubt, consideration of newsworthiness should be broadly construed and yes, courts should be cautious in their consideration of what is newsworthy. *See Lowe v Hearst Communications, Inc.*, 487 F.3d 246 (5th Cir. 2007) (test for determining newsworthiness is to be construed broadly, extending beyond the dissemination of news either in the sense of current events or commentary upon public affairs); *Harper & Rowe Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985) (Courts should be chary of deciding what is and what is not news). Those admonitions aside, however, in *every* single privacy case involving the newsworthiness exception cited in support of the Petition, *courts* evaluated facts and *courts* determined whether the published material at issue was newsworthy. In no case did a court defer to the publisher.

The fact-sensitive balancing conducted by the Eleventh Circuit in determining whether Benoit's nude photos were newsworthy was no different than the nature of the analysis conducted by courts in the very cases cited by Hustler in support of its proposition that publishers are the final arbiters of newsworthiness. Although Hustler argues that the Eleventh Circuit "failed to cite any of the leading Supreme Court decisions in this area ... such as [*Time, Inc. v. Hill*, 385 U.S. 374 (1967); *Regan v. Time, Inc.*, 468 U.S. 641

(1984); and *Harper & Rowe Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985)]", as revealed below, those cases offer no comfort to Hustler in the context of this argument. Petition at 19.

In *Time, Inc. v. Hill*, a "false light" privacy case, this Court considered whether Life Magazine was denied constitutional protections of speech and press when the New York courts awarded damages to a family on allegations that Life Magazine portrayed as accurate, a fictional account of the Hill family's ordeal while held hostage by escaped convicts. 385 U.S. 374 (1967). The Hill family sued Life Magazine on allegations that Life intended to, and did, give the impression that a Broadway play mirrored their experience – a fact which Life Magazine knew to be false. Life Magazine countered that the article was "'a subject of legitimate news interest,' 'a subject of general interest and of value and concern to the public' at the time of publication, and that it was 'published in good faith without any malice whatsoever....'" *Id.* at 379. The lower court ruled against Life Magazine because the article was not a mere dissemination of news but, rather, was intended to advertise and attract attention to the play and increase magazine circulation. *Id.* The New York Court of Appeals affirmed and upon grant of certiorari this Court reversed.

Although *Time, Inc. v. Hill* involved privacy rights juxtaposed with the First Amendment right of freedom of press, the focus of the case and this Court's holding was whether Life Magazine acted with knowing or

reckless falsity in publishing the article.[5] *Id.* at 390-391. Contrary to Hustler's representation, there was no holding in *Hill* that "newsworthiness" is to be determined by publishers and not by the courts. Rather, similar to the Eleventh Circuit, this Court in *Hill* engaged in a fact-sensitive review of the evidence in reaching its determination.

Similarly, in *Regan v. Time, Inc.* this Court considered whether a federal statute prohibiting a publisher from printing an illustration of U.S. currency in color rather than in black and white, or in dimensions approximating the size of genuine currency, violated the First Amendment protections of freedom of speech or press. 468 U.S. 641 (1984). A publisher brought a federal action challenging the constitutionality of 18 U.S.C. §§ 474 and 504. This Court determined that the purpose requirement of the statutes in question was discriminatory on the basis of content in violation of the First Amendment right of freedom of speech. *Id.* at 659. Unlike *Regan*, however, the case at bar did not arise out of a constitutional challenge to, or scrutiny of, Georgia's right of publicity law. Nor does the issue here arise out of the First Amendment freedom of speech. Rather, Hustler is asking this Court to determine whether the Eleventh Circuit erred in its review of the factual allegations and whether it misapplied Georgia law.[6] *Regan*

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[5] Of course, the question of truth or falsity is not pertinent to the case at bar

[6] As previously noted, Supreme Court Rule 10 expressly provides that assertion of error consisting of erroneous factual findings or the misapplication of a properly stated rule is not a proper basis for granting certiorari

provides no support for the proposition that the determination of newsworthiness is left to a publisher's discretion.

In *Harper & Rowe, Publishers, Inc. v. Nation Enterprises*, this Court considered to what extent the "fair use" provision of the Copyright Revision Act of 1976, 17 U.S.C. § 107, sanctioned the unauthorized use of quotations from a public figure's unpublished manuscript. 471 U.S. 539 (1985). A magazine that published verbatim quotes from President Ford's unpublished memoirs without his consent asserted that First Amendment values required the Court to excuse the unauthorized use of copyrighted material – a use that would ordinarily not pass muster as a fair use – because the pirated quotations constituted news in which the public would have interest. *Id.* at 555-556. In holding that the publication was not "fair use," this Court undertook a factual review of the case and focused on the purpose behind the magazine's unauthorized publication Of particular interest was the fact that the magazine's purpose hinged primarily on commercial interests and "had not merely the incidental effect but the *intended purpose* of supplanting the copyright holder's commercially valuable right of first publication." *Id.* at 562 (emphasis in original). Again, contrary to Hustler's representation, there was no determination by this Court that publishers retain the absolute right to determine what is newsworthy. Rather, the Court conducted a factual analysis and held that the doctrine of fair use should not be expanded to create what would have amounted to a public figure exception to this nation's copyright laws.

Moreover, in *Zacchini v. Scripps-Howard Broadcasting Co.*, the only case decided by this Court involving the right of publicity, the Court addressed the issue of whether the First and Fourteenth Amendments immunized a respondent from damages for its alleged infringement of a petitioner's state law "right of publicity." 433 U.S. 562, 568 (1977). This Court did not hold that publishers are the final arbiters of what is or is not newsworthy. In fact, the Court did not even focus on newsworthiness, but, rather, discussed how the right of publicity is violated when the disclosure of information serves to appropriate an individual's economic benefit without his consent. The Court held that, even though a state could, as a matter of law, privilege the press in such circumstances, the First and Fourteenth Amendments do not immunize such action.

Surely neither Hustler nor *amici* seriously contend that Hustler alone gets to decide whether the material it publishes is newsworthy. That simply is not what the cited cases say and that is not the law. There is no split among the Circuits on this issue and the fact balancing conducted by the Eleventh Circuit conforms with the many decisions of this Court. The various privacy rights of action share a common defense that if published material is newsworthy, it can be published. Determination of newsworthiness is, of necessity, dependent upon facts specific to the case. While there are calls here for a bright-line standard for determining when published material is newsworthy, this Court and numerous other courts have already announced guidelines, standards and criteria for making that determination. Because newsworthiness is fact dependent, a bright-line standard is neither

feasible nor is it desirable in the best interests of freedom of the press.

Moreover, an absolutist approach permitting publication of any matter, so long as it was true, has been squarely rejected by this Court. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *The Florida Star v. B.J.F.*, 491 U.S. 524, 532-33 (1989) ("Our cases have carefully eschewed reaching this ultimate question, mindful that the future may bring scenarios which prudence counsels our not resolving anticipatorily.... We continue to believe that the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep not more broadly than the appropriate context of the instant case"); *Bartnicki v Vopper*, 532 U.S. 514 (2001) (The Court recognized "a conflict between interests of the highest order – on the one hand, the interest on the full and free dissemination of information concerning public issues, and, on the other hand, the interest in individual privacy..." and the Court continued its refusal to address, in the abstract, whether publication of truthful information may ever be punished.)

The Court is evidently comfortable in narrowly balancing privacy interests of specific plaintiffs against what is viewed by the publisher as a matter of legitimate public concern. This balancing cannot occur under a theory that would permit the publisher to decide. Indeed, such a rule would cause privacy torts to be written out of the law at a time when personal privacy is under siege like no other time in history. Hustler's assertion that privacy protections be not based in rights bestowed by law, but rather on the

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taste and discretion of the press, is unsupported and unfounded.

ii) There Is No Split Among the Circuits Over How Newsworthiness Is Determined.

Notwithstanding clear agreement among the Circuits, Hustler argues that some Circuits disagree about how newsworthiness is determined, thus, requiring this Court's review. The cases upon which Hustler relies, however, do not demonstrate a split: *Lowe v. Hearst Communications, Inc* , 487 F.3d 246 (5th Cir. 2007); *Anderson v. Suiters*, 499 F.3d 1228 (10th Cir. 2007); *Ross v. Midwest Communications, Inc.*, 870 F.2d 271 (5th Cir. 1989); and *Alvarado v. KOB-TV, LLC*, 493 F.3d 1210 (10th Cir. 2007). If Hustler actually provided an analysis of the cases cited, rather than merely relying on "sound bites" and "snippets" from those cases, which are factually and legally distinguishable from the instant case and provide no support for granting the Petition, that fact would be obvious. Indeed, and as seen below, when the determination of newsworthiness is at issue, any perceived split of authority is illusory and the manner of determining the newsworthiness of published material is uniform. Just as the Eleventh Circuit utilized a fact sensitive balancing, so to do the other Circuits.

In *Lowe v. Hearst Communications*, a newspaper published an article describing a blackmail scheme carried out by two married attorneys 487 F.3d at 250-252. Subsequent to the article, the couple's bankruptcy estate filed a civil suit against the newspaper seeking damages for the public disclosure

of private facts. Similar to the case at bar, the Fifth Circuit acknowledged that state law controlled, with viability of the claim hinging on whether the publicized matter was "of legitimate public concern," entitling the publisher to newsworthiness protection.[7] *Id.* at 250 (citing *Cinel v. Cinnick*, 15 F.3d 1338, 1345-46 (5th Cir. 1994)). In order to reach its holding, the Fifth Circuit, like the Eleventh Circuit, analyzed the particular facts of the case. In so doing, it held that because the article described the use of the state's legal system – a system designed to protect the public – by prominent lawyers in a way that could be described as blackmail, the matter was of public concern and, thus, was considered newsworthy.

Similarly, in *Ross v. Midwest Communications, Inc.*, a rape victim brought suit alleging invasion of privacy against journalists for broadcasting a documentary that revealed details of her rape. The documentary was designed to help exonerate one rape suspect while casting suspicion on other suspects. 870 F.2d 271 (5th Cir. 1989). The journalists contended that the details of the rape were closely connected to an ongoing criminal investigation – a matter of legitimate public concern – and, thus, Texas and federal constitutional law prohibited the imposition of liability. *Id.* at 272. In addressing newsworthiness, the Fifth Circuit, like the Eleventh Circuit, necessarily undertook a fact-based review, holding that there was a logical nexus between the publication and a matter

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[7] "Of legitimate public concern" is the term, coined from Restatement (Second) of Torts § 652D, used to define newsworthiness – a term used uniformly throughout the country in privacy tort claims.

of legitimate public concern because the point of the publication, including details of the crime, was to persuade the public and authorities about a person's guilt or innocence. *Id.* at 274.

The *Ross* Court expressly noted that *it did not need to decide* the extent of judicial deference to editorial discretion, *nor did it need to decide* how much "'breathing room' is available to protect an editor, who publishes information that was potentially but not actually newsworthy, from retrospective judicial blue penciling." *Id.* at 275 (emphasis added). Rather, like the Eleventh Circuit, its holding was intended to be narrow, turning only upon the particular facts of the case. *Id.*

In *Anderson v. Suiters*, the Tenth Circuit balanced a rape victim's privacy rights against the media's First Amendment right of freedom of the press, ruling that *under the facts presented,* freedom of the press prevailed 499 F.3d 1228 (10th Cir. 2007). However, the court noted:

> Even where certain matters are clearly within the protected sphere of legitimate public interest, some private facts about an individual may lie outside that sphere .... [T]o properly balance freedom of the press against the right of privacy, every private fact disclosed in an otherwise truthful, newsworthy publication *must have some substantial relevance to a matter of legitimate public interest.*

Id. at 1236 (emphasis in original). That statement comports precisely with how the Eleventh Circuit balanced the competing issues below.

In *Anderson*, the plaintiff was raped by her estranged husband, a prominent local attorney, who secretly videotaped the incident. A copy of the videotape was released to the media and aired to the public. The rape victim sued the television station, its reporter, and a police officer who released the tape, alleging that displaying the videotape violated her constitutional privacy interests. The Tenth Circuit held that the release and broadcast of the videotape did not violate the victim's rights of privacy because the focus of the news broadcast was on the rapist and not on the victim. *Id.* at 1237. In reaching that conclusion, the Tenth Circuit, just like the Eleventh Circuit here, undertook a fact-intensive analysis to determine whether the videotape was substantially relevant to a matter of legitimate public interest.[8] The Tenth Circuit further acknowledged that a different result would have been required had the focus of the videotape been on the rape victim instead of on the rapist, because the privacy interests of the two could not be more different. *Id.* at 1237.

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[8] The videotape was displayed in connection with an ongoing investigation of a series of rapes allegedly perpetrated by the plaintiff's estranged husband, yielding a result similar to the Supreme Court of Georgia's decision in *Waters v. Fleetwood*, 212 Ga. 161, 91 S.E.2d 344 (1956). In *Waters*, plaintiffs' daughter was murdered and her brutalized and partially decomposed body was photographed shortly after being recovered from a river and was published in a local newspaper in connection with the timely, ongoing investigation of the murder. The court rejected plaintiffs' right of privacy claim finding that a publication concerning a matter of public interest or the subject matter of a public investigation does not violate one's right of privacy. A common thread connecting *Waters* to the cases relied upon by the court was that each involved the subject matter of a concurrent public investigation of a crime of great public interest.

In *Alvarado v. KOB-TV, LLC*, two undercover police officers brought invasion of privacy claims against a local television station for broadcasting their identities and undercover status in the context of their suspected involvement in an alleged incident of sexual assault. 493 F.3d 1210 (10th Cir. 2007). The United States District Court for the District of New Mexico dismissed the claims for failure to state a claim and, on appeal, the Tenth Circuit affirmed. In its analysis, the Tenth Circuit noted that the tort of publication of private facts "involves the publication of true but intimate or private facts about the plaintiff, such as matters concerning the plaintiff's sexual life or health." *Id* at 1218. The court concluded that to avoid dismissal, Plaintiffs must have been able to allege facts from which the court could conclude that the publication was not a matter of public interest *Id.* at 1219. Moreover, the court emphasized its endorsement of the position taken by the commentary in Restatement (Second) of Torts § 652D concerning what matters are of public interest:

> The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake with which a reasonable member of the public, with decent standards, would say that he had no concern

Id. at cmt. h. Again, like the Eleventh Circuit below, the Tenth Circuit in *Alvarado* conducted a review of pertinent facts, concluding that the broadcast was newsworthy as a matter of public interest because the case involved allegations of police misconduct and, therefore, involved a public service position.

Respondent does not dispute that the above-referenced cases resulted in findings that, under the facts presented, the published matter at issue was newsworthy, entitling the publisher in each case to First Amendment protection. The factual analyses in those cases, however, are not determinative of whether this Petition should be granted. Hustler asserts that certiorari should be granted because the Eleventh Circuit, contrary to decisions of other Circuits, erred by conducting a factual determination of newsworthiness. Contrary to that assertion, however, and as the cases above demonstrate, the Circuits, including the Eleventh Circuit, are aligned: to properly balance freedom of the press against the right of privacy, courts must undergo an analysis of the private facts disclosed to determine whether the publication of those facts is a matter of legitimate public interest and, thus, newsworthy. Accordingly, there is no disagreement requiring this Court's review and Hustler's Petition should be denied

iii) The Court Ordinarily Will Not Grant a Petition to Correct Errors of Fact or a Misapplication of the Law.

The final sentence of Rule 10, as amended in 1995, provides that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Hustler does not dispute the Eleventh Circuit's rather detailed discussion of Georgia's right of publicity law and its newsworthiness exception. Indeed, Hustler agrees that the rule of law was correctly stated below and appears to be well settled. Petition at 12 (stating "[t]hus, the Eleventh Circuit correctly recognized – at least in principle – the

'newsworthiness' exception to the Georgia right of publicity"). Notwithstanding this admission, Hustler disagrees with the way in which the Eleventh Circuit applied that law to the facts alleged in the complaint: "[t]he Eleventh Circuit Misinterpreted the Constitutional Standard for Newsworthiness." Petition, Argument II b, at 17-28. Such a merits-like argument is precisely the type of argument discouraged by the final sentence of Rule 10. As stated in *United States v. Johnston*:

> The Supreme Court will usually deny certiorari when review is sought of a lower court decision that turns solely upon an analysis of the particular facts involved, or upon construction of particular contracts or written instruments. 'We do not grant a certiorari to review evidence and discuss specific facts.'

Supreme Court Practice § 4.14 at p. 270 (9th Ed. 2007) (quoting *United States v. Johnston*, 268 U.S. 220, 227 (1925)).

As discussed earlier, Hustler identifies no splits of authority, nor is this a case that involves a matter of obvious national importance and no statutes are implicated in the opinion below. Rather, Hustler wants the Court to grant certiorari simply because it is displeased with the way the Eleventh Circuit applied well-settled principles of Georgia common law to the facts alleged in the complaint. There seems to be little dispute that this Court will generally avoid cases like this one, especially when the primary issue relates to the interpretation or application of *state* law. *Leavitt v. Jane L.*, 518 U.S. 137, 144-145 (1996) ("We do not normally grant petitions for certiorari solely to

review what purports to be an application of state law").[9]

II. The Eleventh Circuit Correctly Applied Georgia Tort Law to the Particular Facts Alleged in the Complaint.

A. Georgia Law Recognizes Where Published Matters Are Utilized for Commercial Purposes Without Consent or Compensation to the Owner, a Right of Action Exists Unless the Newsworthiness Exception Applies.

The verified complaint filed by Respondent asserts a single claim for Hustler's violation of Plaintiff's right of publicity under Georgia law. The Eleventh Circuit below described the Georgia tort thusly:

> [A] right to control if, when, and under what circumstances one's image is made public and subject to scrutiny.

572 F.3d at 1206. The right of publicity was first recognized in Georgia in *Cabaniss v. Hipsley*, 114 Ga. App. 367, 151 S.E.2d 496 (1966) where the plaintiff sued the Atlanta Playboy Club for using her photograph without authorization or compensation in an advertisement. While arising out of the right of privacy, Georgia recognizes a distinction between the

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[9] In *Leavitt*, the Court made an exception where the alternative to granting certiorari would amount to "allowing blatant federal court nullification of state law." *Id.* Hustler does not argue that the Eleventh Circuit nullified Georgia law with respect to the right of publicity or the newsworthiness exception.

right of publicity and the other privacy torts. The court held that the right of publicity "consists of the appropriation of the plaintiff's name or likeness .... The interest protected .. is not so much a mental as proprietary one, in the exclusive use of the plaintiff's name and likeness as an aspect of his identity." 151 S.E.2d at 503-504.

In *Martin Luther King, Jr. Ctr. for Soc Change, Inc. v. Am. Heritage Prods , Inc.*, the Georgia Supreme Court clarified that, under Georgia law, the right of publicity recognizes:

> [t]he rights of private citizens, as well as entertainers, not to have their names and photographs used for the financial gain of the user without their consent, where such use is not authorized as an exercise of freedom of the press.

250 Ga. 135, 296 S.E. 2d 697, 703 (1982). In *Martin Luther King*, defendants marketed busts of Dr. King, accompanied by a free biographical booklet detailing his life. In its discussion of the case, the Eleventh Circuit acknowledged that although the opinion did not expressly deal with the "newsworthiness" exception, the Georgia Supreme Court found the booklet to be irrelevant because it was incidental to the busts themselves. *Toffoloni*, 572 F 3d at 1210. In so doing, the *Martin Luther King* court ultimately held that:

> [W]e hold that the appropriation of another's name and likeness, whether such likeness be a photograph or sculpture, without consent and

> for the financial gain of the appropriator is a tort in Georgia ....

Martin Luther King, 296 S.E.2d at 703. Accordingly, Georgia recognizes that where such published matters are utilized for commercial purposes without authorization or compensation to the owner, a right of action exists unless that right is trumped by the "newsworthiness exception "

Mimicking the *King* defendants' argument in its briefing below and in its Petition here, Hustler posits it is spared from liability for its exploitative publication of Ms. Benoit's photos in its pornographic magazine because the photos are newsworthy. Specifically, Hustler asserts the photographs were newsworthy because they were illustrative of a biographical article which was included in the publication. The Eleventh Circuit disagreed. Following the precedent of the Second Circuit and the reasoning of Georgia's Supreme Court, the Eleventh Circuit considered whether the public interest aspect of the publication – the article – was merely incidental to its commercial purpose – the publication of the unrelated and exploitative nude photographs. *Id.* at 1209 (citing *Titan Sports, Inc. v. Comics World Corp.*, 870 F.2d 85, 87-88 (2d Cir. 1989) (stating "it is appropriate for a court to consider whether the public interest aspect of the publication is merely incident to its commercial purpose")). As discussed more fully below, the Eleventh Circuit held that the publication itself unequivocally demonstrated that the article was indeed incidental to the commercial purpose of the publication.

Moreover, applying the *Martin Luther King* court's reasoning to the specific facts of this case, the Eleventh Circuit stated:

> We are convinced that the Supreme Court of Georgia would find similarly here. LFP's brief biography of Benoit's life, even with its reference to her youthful pursuit of modeling, is merely incidental to its publication of her nude photographs. Therefore, the biographical piece cannot suffice to render the nude photographs newsworthy.

572 F.3d at 1210 The court also rejected Hustler's argument that "someone's notorious death constitutes a carte blanche for the publication of any and all images of that person during his or her life, regardless of whether those images were intentionally kept private and regardless of whether those images are of any relation to the incident currently of public concern." *Id.*

B. The Eleventh Circuit Correctly Performed a Factual Analysis in Determining, Under the Facts Alleged, That Hustler's Publication of Decades-Old Nude Photographs of Nancy Benoit Was Not a Matter of Legitimate Public Concern.

That Georgia courts recognize the newsworthiness exception as a defense to a right of privacy claim is beyond cavil. *See Waters*, *supra*, at 161 In its decision, the Eleventh Circuit, in line with the precedents of its sister Circuits and of this Court, recognized that the competing interests between freedom of the press and the right of privacy require a

fact-sensitive balancing in order to determine whether Hustler's publication of the Benoit photographs constituted a matter of legitimate public concern. *Toffoloni*, 572 F.3d at 1208 (stating "courts are required to engage in a *fact-sensitive balancing*, with an eye toward that which is reasonable and that which resonates with our community morals, in order to protect the Constitution as a whole") (emphasis added). In doing precisely that, the Eleventh Circuit correctly concluded that the newsworthiness exception does not apply here and does not provide Hustler with the First Amendment protection it seeks.

Specifically, the Court undertook a careful and balanced review of the pertinent portions of Petitioner's March, 2008 edition of *Hustler* Magazine, including: the cover (**"WRESTLER CHRIS BENOIT'S MURDERED WIFE NUDE"**); the index (**"NANCY BENOIT Exclusive Nude Pics of the Wrestler's Doomed Wife"**) and the first of a two-page spread featuring ten fully or partially nude photos of Ms. Benoit (**"Exclusive Pics! Exclusive Pics! Exclusive Pics! NANCY BENOIT AU NATUREL – The Long-Lost Images of Wrestler Chris Benoit's Doomed Wife"**). *See Appendix A*, which is excerpted from the cover, index, and photo spread contained in the March, 2008 edition of *Hustler* Magazine.

After its careful review, the Eleventh Circuit ruled that the newsworthiness exception did not apply holding that under the circumstances, there was no connection between a newsworthy event and the nude pictorial, extracted from a videotape taken twenty years before. Indeed, Hustler's focus was not on the murder of Nancy Benoit, nor was it focused on the

murderer, Chris Benoit, or the investigation of the crime. Rather, Hustler's focus was exclusively on "long-lost" nude pictures of Ms. Benoit,[10] which had no substantial relevance to a matter of legitimate public interest – the murder itself.

Even if Ms. Benoit once, in her early twenties, aspired to a nude modeling career, such an alleged aspiration never developed into an incident of public concern.[11] As correctly observed by the Eleventh Circuit, this was particularly the case because Ms. Benoit "sought the destruction of all of those images" immediately after they were taken. *See Toffoloni*, 572 F.3d at 1211. Accordingly, Hustler's publication of the nude photographs, without Ms. Benoit's consent, never provided "information to which the public was entitled." *See* RESTATEMENT (SECOND) OF TORTS §652D, at cmt. h. Rather, Hustler's publication clearly constituted a "morbid and sensational prying into [the private life of Ms. Benoit] for its own sake, with which a reasonable member of the public, *with decent standards*, would say that he had no concerns." *Id.* (emphasis added). Such is exactly the type of information which an individual is entitled to keep private. *Id.* (noting "even public figures .. may be 'entitled' to keep private 'some intimate details .. such

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[10] Hustler admits the allegations contained in the verified complaint that it is a pornographic magazine and that the majority of its content "is graphic and sexual photographs of nude women." Complaint ¶7. In keeping with this theme, the cover, index and caption of the photo spread focused exclusively upon the nude photos themselves. The photos were not connected with any matter of legitimate public interest.

[11] Of note, Ms. Benoit never pursued a nude modeling career.

as sexual relations....' 'The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern'").

Additionally, while certainly not dispositive, the Eleventh Circuit also found support for its decision in *Douglass v. Hustler Magazine, Inc.*, 769 F 2d 1128 (7th Cir. 1985), which involved claims of false light and right of publicity related to Hustler's publication of nude photos of Ms. Douglass without her consent and without compensation. The photos had been taken for a photo shoot for *Playboy* Magazine but the photographer, after becoming employed by Hustler several years after the photos were taken, permitted Hustler to publish them. With respect to the right of publicity, the Court concluded that Illinois (like Georgia) recognizes such a claim and also (like Georgia) acknowledges the newsworthiness exception as a potential defense. Relying on *Zacchini*, *supra*, the Court concluded that "Hustler can run a story on [Ms. Douglass] and use any photographs that are in the public domain...but it cannot use photographs made by others for commercial purposes and ... withheld from public distribution." 769 F.2d at 1138. The Court stated that "forced to guess, we guess that Illinois would recognize a "right of publicity" on the facts of *Zacchini* and the analogous facts of the present case." 769 F.2d at 1139.

In the present case, Hustler acknowledged in the "article" accompanying Ms Benoit's nude pictorial that "[w]hile the original print negatives were destroyed at Nancy's behest, the video from which these images

were taken survived." Those photos were never before published and were certainly not in the public domain. As the Eleventh Circuit correctly concluded following its fact-sensitive balancing, the fact that Hustler published the un-newsworthy photographs and profited as a result is sufficient, under Georgia law, to state a claim upon which relief can be granted. Reversal was appropriate.

CONCLUSION

Because the Petition fails to identify any criteria justifying review by this Court and because the case was decided correctly below, Respondent requests the Petition for a writ of certiorari be denied.

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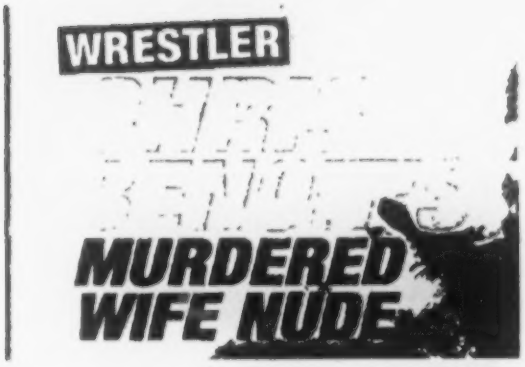

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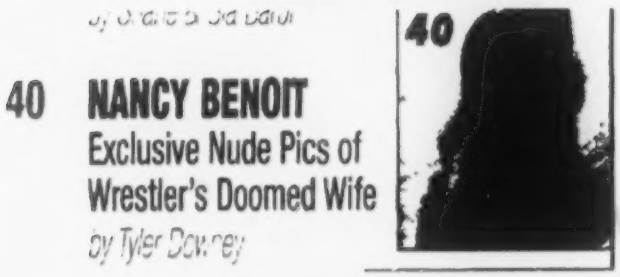

Article Headline

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In The
Supreme Court of the United States

LFP PUBLISHING GROUP, LLC,
d/b/a Hustler Magazine,
Petitioner,

v.

MAUREEN TOFFOLONI, as Administrator and Personal Representative of the Estate of Nancy E. Benoit,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF FOR PETITIONER

Respondent asserts in her opposing Brief ("Resp. Brief') that the instant Petition for a writ of certiorari by LFP Publishing Group, LLC ("LFP"), as well as the supporting Briefs submitted by a*micus curiae,* fail to comport with this Court's Rule 10 governing its considerations for granting a such a writ. (Resp. Brief, pp.5-6). As relevant, Rule 10 provides that a writ of certiorari may be granted where a court of appeals has rendered a decision in conflict with a decision of another court of appeals on the same important matter; or it has decided an important federal question in conflict with the relevant decisions of this Court. Here, both of those criteria have been met, as seen from the Petition and *amicus* Briefs. That is, a number of circuit court decisions are contrary to the restrictive ruling of the Eleventh Circuit below, that the subject nude photographs of decedent public figure Nancy Benoit ("Benoit") were not deemed to be sufficiently "newsworthy" to be outside of the ambit of the Georgia common law right of publicity tort sued upon by Plaintiff Maureen Toffoloni ("Toffoloni").

In addition, the narrow ruling by the Eleventh Circuit is contrary to several opinions of this Court, stating that publishers are to be afforded wide latitude in determining for themselves what is "newsworthy" under the press freedoms expressly granted by the First Amendment. Accordingly, Petitioner respectfully requests that a writ of certiorari be granted to correct the important, erroneous ruling of the Eleventh Circuit below. The rationale of that ruling would perversely allow

courts to weigh equally the individual economic publicity rights provided in a state common law tort, against the express right of freedom of the press granted by the First Amendment. Moreover, as stated in the *amicus* Brief of The Reporters Committee for Freedom of the Press and The Society for Professional Journalists, said opinion, "goes well beyond the photographs that appear in magazines such as Petitioner's to affect all newsgathering" (p.4).

I. THE DECISION BY THE ELEVENTH CIRCUIT BELOW IS IN CONFLICT WITH THE DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS ON THE SAME IMPORTANT MATTER.

Respondent asserts that the Eleventh Circuit opinion is "directly in line" with other circuits, specifically naming the Second, Fifth, Seventh and Tenth Circuits, which she claims have held that to balance the First Amendment right of freedom of the press against the right of privacy, "every private fact disclosed in an otherwise truthful newsworthy publication must have some substantial relevance to a matter of legitimate public interest," citing Toffoloni v. LFP Publishing Group, LLC, 572 F.3d 1201, 1212 (11th Cir. 2009) [Resp. Brief, pp.8-9]. That assertion is erroneous.

As an initial matter, and as will be further discussed in Point II *infra*, this case is not about the right of privacy, a strictly personal right of a living plaintiff, but about the different right of publicity, an

economic property right. Here, Respondent Toffoloni's Complaint asserts a single tort cause of action against Petitioner LFP, invoking decedent Benoit's Georgia posthumous common law right of publicity, not a right of privacy. Nevertheless, Petitioner will review the arguments raised by Respondent as to privacy rights.

For her purported reliance on Tenth Circuit decisions, Respondent cites Gilbert v. Med. Econ. Co., 665 F.2d 305, 308 (10th Cir. 1981) [Resp. Brief, p.9]. However, that circuit court in Anderson v. Suiters, 499 F.3d 1228, 1236 (10th Cir. 2007), quoting from an earlier decision,[1] recently acknowledged that other courts give public interest status to news material "on an aggregate basis, rather than itemizing what in the news report would qualify and what could remain private" (citation omitted). Thus, the Tenth Circuit does not require a parsing of every single potentially private fact in a news article to have specific relevance to a newsworthy item. In Anderson, an alleged rape victim sued a television station and others for airing a fictional depiction of her rape, a highly personal and embarrassing matter. Nevertheless, the Tenth Circuit found the report to be overall of legitimate public interest and affirmed summary judgment dismissing the claim.

Similarly, Respondent's mischaracterization of the Fifth Circuit's position is demonstrated by Lowe v. Hearst Communications, Inc., 487 F.3d 246 (5th

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[1] Alavarado v. KOB-TV, LLC, 493 F.3d 1210, 1221 (10th Cir. 2007).

Cir. 2007). In its expansive reading of First Amendment protection for publishers, that court emphasized it would not become involved "in deciding the newsworthiness of specific details in a newsworthy story where the details were 'substantially related' to the story." 487 F.3d at 251. Thus, the Fifth Circuit also declined to become involved in scrutinizing the individual details of a newsworthy story where the overall piece is newsworthy. Here, it is beyond dispute that the murder of decedent Benoit was national news, and that *Hustler* Magazine's biographical story on her life and death was of public interest.

The decision in Titan Sports, Inc. v. Comics World Corp., 870 F.2d 85 (2d Cir. 1989) [Resp. Brief, p.9], dealt with the unauthorized publication of large photographs of various professional wrestlers[2] folded and stapled into the center of a wrestling magazine like posters, which were used to advertise and sell the magazine. No newsworthy event was associated with the magazine. The Second Circuit found an issue of fact as to whether the photographs/posters were a commercial use, or of public interest protected by the First Amendment. (870 F.2d at 89).

The foregoing circuit court rulings merely requiring for insulation from privacy liability that each fact be substantially related to a newsworthy matter of public interest as a whole, strikingly conflict with the Eleventh Circuit's much more

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[2] Titan Sports owned the rights in the wrestlers' names and likenesses. 870 F.2d at 87.

stringent requirement that each private fact must itself be newsworthy.

Next, Respondent expressly agrees with Petitioner as to the liberal construction to be given to "newsworthiness." Thus, Respondent proclaims: "No doubt, consideration of newsworthiness should be broadly construed, and yes, courts should be cautious in their consideration of what is newsworthy" (Resp. Brief, p.10). She even cites Harper & Rowe Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 561 (1985), stating that "Courts should be chary of deciding what is and what is not news." (Resp. Brief, p.10).

Respondent, however, raises a "straw man" argument, asserting it is Petitioner's proposition that "publishers are the final arbiters of newsworthiness." (Resp. Brief, p.10). This is a serious exaggeration of LFP's position. Petitioner does not claim that it and other publishers have an unfettered right to publish whatever they choose, without any judicial oversight. What Petitioner does assert is that in the case of an article of clear public interest, such as the present one on the life and death of Nancy Benoit, a celebrity even before her sensational murder, a publisher should be afforded substantial discretion to determine what is newsworthy to its readers. Here, decedent Benoit had been a flamboyant celebrity in the wrestling world under the name "Fallen Angel"; even Respondent concedes she was a public figure prior to her murder. The fact that Benoit once posed nude intending to further a modeling career is of interest to many readers of *Hustler* magazine and others.

Respondent's contention that this Court's seminal opinion in Time, Inc. v. Hill, 385 U.S. 374 (1967), did not hold that newsworthiness is to be determined by publishers and not by the courts (Resp. Brief, p.12), is another false argument. In a civil society where legal issues are ultimately determined by courts, obviously publishers do not have *carte blanche* to publish anything they desire; nor does Petitioner so assert. However, the First Amendment demands that publishers be given wide latitude in their determination of what is newsworthy, and courts should be reluctant to overrule such decisions, as this Court has recognized, Harper & Rowe, supra, 471 U.S. at 561.

Curiously, in its opinion below, the Eleventh Circuit failed to cite a single decision of this Court analyzing the rights of publishers under the First Amendment. The only opinion of this Court therein mentioned is Zacchini v. Scripps-Howard Broadcasting, Co., 433 U.S. 562 (1977), which Respondent agrees does not discuss that issue. (Resp. Brief, p.14). Rather, it narrowly ruled that where a television station broadcast plaintiff's entire "human cannonball" entertainment act without authorization, the First and Fourteenth Amendments did not immunize defendants from liability on the right of publicity claim under Ohio tort law.

Respondent's attempts to distinguish cases cited by Petitioner and *amicus curiae* are entirely unpersuasive, as the judicial philosophy granting broad discretion to publishers of material of public interest is quite clear from other circuits. For

instance, Respondent cites Lowe v. Hearst Communications, Inc., 487 F.3d 246 (5th Cir. 2007) [Resp. Brief, p.16], as merely standing for the proposition that because the case involved the state's legal system by lawyers in an arguably blackmail context, it was of public interest and therefore it was lawful to publish private facts about plaintiff. There, a claim for invasion of privacy against a newspaper that revealed details of an alleged extortion scheme was dismissed. The Fifth Circuit stated that it rejected "excessive judicial intervention" which might result in the withholding of critical information of legitimate public interest; the court declined to become involved in deciding the newsworthiness of specific details of a newsworthy story where they were overall substantially related to the newsworthy matter. 487 F.3d at 251.

In Ross v. Midwest Communications, Inc., 870 F.2d 271 (5th Cir. 1989) [Resp. Brief, pp.17-18], a woman identified as a rape victim in a documentary sued for invasion of privacy. The Fifth Circuit affirmed dismissal of her claim, finding that the intimate details of the living plaintiff were newsworthy, and publication was protected by the First Amendment. Unquestionably, the details of her rape were extremely embarrassing to the Ross plaintiff. The court warned that "judges, acting with the benefit of hindsight, must resist the temptation to edit journalists aggressively." 870 F.2d at 275.

Respondent even cites Anderson v. Suiters, supra (Resp. Brief, pp.18-19), for the proposition that in balancing freedom of the press against the right of privacy, "every private fact disclosed in an otherwise

truthful, newsworthy publication *must have some substantial relevance to a matter of legitimate public interest*," 499 F.3d at 1236; emphasis in original. But as explained above, that quotation was taken from an older Tenth Circuit case, Gilbert v. Med. Econ. Co., 665 F.2d 305, 308 (10th Cir. 1981). In Anderson, a more recent invasion of privacy case involving depiction of an alleged rape, the court agreed that the sensitive nature of the material in question might make its disclosure highly offensive, but that did not make the videotape less newsworthy, "so long as the material as a whole is substantially relevant to a legitimate matter of public concern," 499 F.3d at 1236, citing Ross, supra. Thus, under current Tenth Circuit law, the issue is whether the material in question is related to a matter newsworthy as a whole, not reviewing individual parts of the publication to see if each portion is itself newsworthy.

Here, it is undisputed that the *Hustler* article on Ms. Benoit's life and death was a matter of public interest. The fact that the former "Fallen Angel" also posed nude as a young woman is clearly related to her life story, and the photos illustrating that part of her life are substantially related to the newsworthy article as a whole.

II. THE ELEVENTH CIRCUIT ERRONEOUSLY BALANCED THE GEORGIA COMMON LAW RIGHT OF PUBLICITY TORT AGAINST THE EXPRESS FIRST AMENDMENT RIGHT OF FREEDOM OF THE PRESS.

A crucial part of the erroneous analysis by the Eleventh Circuit was its attempt to balance the mere state common law economic tort of the right of publicity (in the guise of a purported right of privacy) against the express First Amendment right of freedom of the press. Respondent has made the same mistake as well.

In its opinion, the Eleventh Circuit stated that the rights of freedom of speech and of the press guaranteed by the First Amendment, and the right to privacy guaranteed by the due process clause, are fundamental Constitutional rights that have no hierarchy between them. Accordingly, it asserted that the Constitution required a balancing of the supposedly co-equal fundamental rights, "which resonates with our community morals." (572 F.3d at 1207-08; Resp. Brief, p.3). However, that is a false balance in this instance.

The right of privacy, as recognized by the due process clauses, is a personal right of a living person. As described by Professor McCarthy in his treatise, privacy rights "protect human dignitary values, damage to which is measured by mental and physical suffering and damage to reputation. Such classic 'privacy' rights die with the person whose

privacy was allegedly invaded."[3] On the other hand, the right of publicity is an economic right that concerns the monetary value in the name, picture or likeness of a celebrity or public figure. Martin Luther King, Jr. Center v. American Heritage Products, 250 Ga. 135, 142 (1982). In Georgia, that property right is freely assignable during the person's lifetime, 250 Ga. at 143, and is posthumous, "inheritable and devisable," 250 Ga. at 145.

This Court recognized the economic value in an Ohio right of publicity claim in Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977). Zacchini also acknowledged the difference between the privacy and publicity torts, stating that a false light privacy claim sought to protect the plaintiff's reputation and against mental distress; a publicity claim protects plaintiff's "proprietary interest" (433 U.S. at 573).

The Eleventh Circuit erroneously attempted to conflate the rights of privacy and publicity. It is the personal right of privacy that is protected by due process; the right of publicity is a mere state tort law property right. Moreover, "'Property interests, of course, are not created by the Constitution,' but rather 'by existing rules or understandings that stem from an independent source such as state law.'" Board of Regents of State College v. Roth, 408 U.S. 564, 577 (1972). Thus, where Nancy Benoit's death precipitated this matter, any right of privacy claim died with her, and no basis exists for a balancing of the right of freedom of the press against any kind of

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[3] 2 J. Thomas McCarthy, The Rights of Publicity and Privacy, § 9.1. pp. 394-95 (2d ed. 2009).

due process privacy claim by Respondent Toffoloni. In any event, the Georgia common law state property tort of the right of publicity cannot be used to trump the express freedoms afforded to Petitioner publisher by the First Amendment.

Here, both the circuit court below and Respondent mistakenly sought to balance what they believed to be opposite constitutional rights; namely, "the competing interests between freedom of the press and the right of privacy" (Resp. Brief, p.26). However, the actual competing interests herein are the express constitutional right of freedom of the press versus the lesser state common law right of publicity – a mere economic tort.

The error of the Eleventh Circuit's analysis is further illustrated by its reliance on Douglass v. Hustler Magazine, Inc., 769 F.2d 1128 (7th Cir. 1985), discussed at 572 F.3d 1212-13 (Resp. Brief, p.29). Douglass involved a successful action against a predecessor of Petitioner for its unauthorized publication of nude photos of plaintiff that she had posed for in *Playboy* magazine. There, plaintiff was a living model who professionally posed for nude photographs, and there was no newsworthy event substantially related to the publishing of the unauthorized photographs. Thus, Douglass is completely distinguishable from the instant case, where publication of decedent Benoit's photographs was clearly related to a newsworthy event. Moreover, in Douglass, the Seventh Circuit indicated that forbidding *Hustler* magazine to publish any photographs of people without their consent because

the magazine may be offensive to some would likely violate the First Amendment. 769 F.2d at 1139.

CONCLUSION

Here, the posed, non-obscene nude photographs of decedent Benoit, a public figure prior to her death, were part of a newsworthy biographical article on her life and death. To the extent that state common law might allow liability under these circumstances for violation of her right of publicity, such a result should be proscribed by the freedom of the press afforded to Petitioner by the First Amendment to the United States Constitution.

For the reasons set forth above, and in the original Petition and the supporting *amicus* Briefs, the Petition for a writ of certiorari should be granted.

Dated: February 4, 2010

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IN THE

Supreme Court of the United States

LFP PUBLISHING GROUP, LLC,
D/B/A HUSTLER MAGAZINE,
Petitioner,

v.

MAUREEN TOFFOLONI, AS ADMINISTRATOR AND PERSONAL REPRESENTATIVE OF THE ESTATE OF NANCY E. BENOIT,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

AMICUS CURIAE BRIEF OF FIRST AMENDMENT LAWYERS ASSOCIATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE A BRIEF OF *AMICUS CURIAE*

Amicus Curiae First Amendment Lawyers Association ("FALA") hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for petitioner has been obtained; the consent of the attorney for respondent was requested but was refused.

FALA is an Illinois not-for-profit corporation with over 180 members throughout the United States and Canada. Its members, who include the most prominent U.S. First Amendment attorneys covering virtually every state, regularly litigate various facets of the issues before this Court by consistently defending the rights to free speech and expression against governmental intrusion, and advancing sound First Amendment jurisprudence in the Courts.

Amicus believes the Eleventh Circuit decision in this action significantly erodes First Amendment freedoms, and in particular those the Constitution intends publishers of all stripes to enjoy. FALA is concerned not just because the decision below restrictively construing the nexus between news and photographs pertinent to it appears driven in significant part by the nature of the publication at issue, but because its holding implicates the degree of free speech protection all publishers enjoy to exercise editorial discretion as to what merits coverage, and how news should be illustrated.

Amicus Curiae believes that its Brief assists the Court in two respects. First, *Amicus* more fully

explicates the circuit split that is mentioned in the Petition. *Amicus* believes it is vital that the Court understand how the rule adopted by the Eleventh Circuit in this case diverges from the positions taken in other Circuits and, in particular, the Fifth Circuit Court of Appeals. Second, *Amicus* discusses the broad array of media that will be affected by the Eleventh Circuit's reasoning, so that the Court can appreciate how many different forms of media will be hindered in their ability to publish newsworthy material.

Wherefore, *Amicus* seeks to file this brief to help ensure that all publishers enjoy the full breathing space the First Amendment anticipates and requires.

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INTEREST OF *AMICUS CURIAE* [1]

Amicus Curiae First Amendment Lawyers Association ("FALA") is an Illinois not-for-profit corporation with over 180 members throughout the United States and Canada. Its members, who include the most prominent U.S. First Amendment attorneys covering virtually every state, regularly litigate various facets of the issues before this Court by consistently defending the rights to free speech and expression against governmental intrusion, and advancing sound First Amendment jurisprudence in the Courts.

SUMMARY OF ARGUMENT

This case provides the Court with a unique opportunity to resolve the question of whether a commercial interest in photographs can preclude their publication in connection with an article that is indisputably newsworthy. This case does not involve any questions of embarrassment or emotional distress arising from the publication of the photographs. Under Georgia law, any action based on such damages did not survive the death of the person depicted. Thus, this case presents the narrow question of whether the

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[1] Pursuant to Sup. Ct. R. 37.6, counsel for *Amicus Curiae* declare that they authored this brief in total with no assistance from the parties. Additionally, no individuals or organizations other than the *Amicus* made a monetary contribution to the preparation and submission of this brief. Written consent of petitioner to the filing of the brief has been filed with the Clerk pursuant to Sup. Ct. R. 37.2(a). Pursuant to Sup. Ct. R.. 37.2(a), respondent was advised on December 16, 2009, that *Amicus Curiae* intended to submit a brief in support of review and consent was requested, but it was refused.

First Amendment bars a claim that a publication infringes the subject's commercial right of publicity.

The Eleventh Circuit's restrictive definition of "newsworthiness" to evaluate whether Defendant's publication is entitled to the protection of the First Amendment creates different standards for publishers and other media in the United States. It exposes publishers to a significant risk of liability in the Eleventh Circuit for speech that is fully protected elsewhere. The Fifth Circuit, for example, has eschewed the judicial blue-lining embraced by the Eleventh Circuit, and holds that courts may not evaluate the elements of a protected work, to determine whether each element is entitled to the First Amendment's protection, so long as any argument can be made that the elements have some relevance to the work's topic. The Fifth Circuit thus adheres to this Court's precedents, which have made clear that in almost every case it is up to editors, not judges, to decide what true information can and should be included in an article or story. This Court should resolve the circuit split by making clear that judges may not second-guess the exercise of editorial discretion in deciding what photographs should accompany a newsworthy article.

This case is not just about *Hustler* magazine, and its holding will not affect just this single entity. Indeed, the questions presented here are of tremendous interest to the industry groups and media entities that would benefit from the Court accepting review. Every week, magazine and newspaper stands across the country publish photographs that could be described, as the Eleventh Circuit did here, as the

heart of the article. Indeed, photographs are a staple of the magazine industry and the primary component of many magazines. The burgeoning gaming industry also relies heavily on images, many reminiscent of celebrities and other public figures. These images are part of the product and courts uniformly recognize that they are entitled to the protection of the First Amendment.

The Eleventh Circuit's ruling exacerbates the disarray in the law regarding this issue. Now, media entities must adhere to the Eleventh Circuit's restrictive definition of "newsworthiness" or face liability in that circuit for speech that should be fully protected. They must censor themselves – resulting in less speech for everyone – lest a court in Birmingham, Atlanta or Gainesville decide that photographs of the subject of an article are insufficiently connected to the article. The subjective nature of this inquiry, which relies on the predispositions of the judges hearing the case, will force all media entities to publish only what is safe.

The First Amendment demands more breathing room than the Eleventh Circuit's decision will allow. This Court should grant review in this case and ensure that the protections afforded by the First Amendment are uniform throughout the circuits, and give the appropriate discretion to the editors and journalists who publish newsworthy works.

REASONS FOR GRANTING THE PETITION

A. The Eleventh Circuit's Decision Magnifies the Existing Circuit Split, Permitting Courts Broad Discretion in Deciding What Is "Newsworthy" and Entitled to First Amendment Protection.

Three times in the 1970's and again in 1989, this Court considered whether a media entity could be punished for its publication of true information. Each time, it held that the First Amendment prohibited imposing liability on defendant. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *Oklahoma Publ'g Co. v. Oklahoma County District Court*, 430 U.S. 308 (1977); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979); *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989). In *Florida Star*, the Court explained that its cases "have carefully eschewed" resolving the question of whether "truthful publication may [ever] be punished consistent with the First Amendment" because "the future may bring scenarios which prudence counsels our not resolving anticipatorily." 491 U.S. at 532 (citations omitted).

In the wake of *Florida Star*, the circuit courts have struggled to decide under what circumstances, if any, truthful publication may be punished. The question, as framed by the courts, is whether the material is "newsworthy" and therefore entitled to the protection of the First Amendment. This question typically arises in two types of invasion of privacy cases – public disclosure of private facts, and the right of publicity/commercial misappropriation. The courts have arrived at different conclusions regarding the

discretion appropriately afforded to journalists in deciding the scope of material to be disclosed.

In *Ross v. Midwest Comm'n, Inc.*, 870 F.2d 271 (5th Cir. 1989), the Fifth Circuit broadly defined the media's editorial discretion to decide what is "newsworthy" and appropriate for publication. There, a woman who was identified by name as a rape victim in a documentary discussing the crime sued, claiming invasion of privacy. The court affirmed the district court's grant of summary judgment to the journalists, concluding that the intimate details revealed were newsworthy and therefore protected by the First Amendment.

In reaching its conclusion, the Fifth Circuit explained that "judges, acting with the benefit of hindsight, must resist the temptation to edit journalists aggressively." *Id.* at 275. This is because "[e]xuberant judicial blue-penciling after-the-fact would blunt the quills of even the most honorable journalists." *Id.* Thus, the court adopted a standard for evaluating newsworthiness that follows this Court's mandates in interpreting the First Amendment:

> Here, it is at least arguable, even with the benefit of hindsight, that WCCO was correct in its judgment about the newsworthiness of the victim's identity. That conclusion, although it in no way diminishes the victim's legitimate distress, justifies the district court's grant of summary judgment to defendants.

Id.

The Fifth Circuit has not wavered from its commitment to affording journalists and editors the discretion they need to ensure that a broad array of newsworthy information is published without fear of liability. In *Lowe v. Hearst*, 487 F.3d 246, 251 (5th Cir. 2007), the court affirmed dismissal of an invasion of privacy claim against a newspaper based on its disclosure of information regarding an alleged extortion scheme. The court made clear its rejection of "excessive judicial intervention" which "'foreseeably could cause critical information of legitimate public interest to be withheld until it becomes untimely and worthless to an informed public.'" *Id.* (citation omitted). The court explained that it "has declined to get involved in deciding the newsworthiness of specific details in a newsworthy story where the details were 'substantially related' to the story." *Id.* (citation omitted). It concluded by "declin[ing] to circumscribe the paper's coverage in this case by imposing judicial rules on what is relevant and appropriate in a story that is based on very personal [sic], which became newsworthy by their connection to the alleged crimes." *Id.*

Recent decisions from the Tenth Circuit, like the Fifth Circuit, afford the media broad discretion in deciding what should be published. In *Alvarado v. KOB-TV*, 493 F.3d 1210 (10th Cir. 2007), the court affirmed dismissal of privacy claims filed by two undercover officers whose identities were disclosed in a newscast. That court explained that "courts have not defined the tort of public disclosure of private facts in a way that would obligate a publisher to parse out concededly public interest information ... from allegedly private facts ...." *Id.* at 1221. Rather, courts

"appear to give 'public interest' status to news material on an aggregate basis, rather than itemizing what in the news report would qualify and what could remain private." *Id.* (citation omitted). *See also Anderson v. Suiters*, 499 F.3d 1228, 1236 (10th Cir. 2007) (disclosure of information protected, even if it is highly offensive, "so long as the material as a whole is substantially relevant to a legitimate matter of public concern").

The Ninth Circuit has taken yet another approach. It defers to "community mores" to decide what can be published. *Virgil v. Time, Inc.*, 527 F.2d 1122, 1131 (9th Cir. 1975). There, the court explained that "if there is room for differing views as to the state of community mores or the manner in which it would operate upon the facts in question, there is room for the jury function." *Id.* at 1130. The court did not resolve the case, remanding to the district court to reconsider its order denying summary judgment to Time, Inc. based on its publication of information about surfing legend Michael Virgil. *Id.* at 1131.c[2]

In contrast, in this case the Eleventh Circuit closely circumscribed the media's discretion to decide what is "newsworthy" and should be published. It embarked on "an intensive review of both the relationship between the published photographs and the corresponding article, as well as the relationship between the published photographs and the incident of public concern – Benoit's murder." 572 F.3d at 1208-1209. The court held that "to properly balance freedom of the press against the right of privacy, *every*

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[2] *Virgil* was cited in dissent in *Florida Star*, 491 U.S. at 552, but remains binding law in the Ninth Circuit today.

private fact disclosed in an otherwise truthful, newsworthy publication must have some substantial relevance to a matter of legitimate public interest." *Id.* at 1212 (citation omitted; emphasis added). Thus it adopted an approach – vastly different from the approaches in the Fifth, Ninth and Tenth Circuits – in which each article facet at issue must be separately evaluated by the court to determine whether it is newsworthy.

B. This Decision Will Affect a Broad Array of Media Entities, Whose Products Rely Heavily on Photographs and Other Types of Images.

Life magazine describes itself as "Your World in Pictures." With print publication spanning seven decades – from 1936 until 2007 – it contained some of the best-remembered photographs of the twentieth century. Its images, which capture moments of history and intimate details of celebrity, became iconic. Teaming with Google, *Life*'s photo archive is now available in its entirety online. And *Life* continues on the Internet, providing the public with modern photos, ranging from "Ethiopa's Vanishing Tribes" to "Inappropriate Behavior on the Red Carpet," and "Suri Cruise, with Mom and Dad." Its business model – text primarily limited to captions for the photographs that dominate *Life*'s pages (and web pages) – makes it unique among magazines and Internet sites. It also serves to emphasize the power and range of information that can be conveyed by a photograph.

Other magazines are less dominated by photography, but it remains a staple of their appeal. *National Geographic* has been published continuously

since 1888 and currently is received by more than fifty million people each month. Regularly recognized and awarded for its photography, its images tell stories in a way that words cannot. In a different genre, *Star* magazine contains any number of pages comprised almost entirely of photographs showing celebrities in a variety of situations. Some are not flattering – the "Best and Worst Beach Bodies" is not kind to some of the celebrities featured there – but all are of interest to its ten million readers. *People*, *US Weekly* and a variety of other magazines offer a similar format to their readers – lots of pictures, many of them taken without the subject's consent, accompanied by short articles or captions describing some event from the subject's life.

Magazines are not alone in their reliance on images to tell a story. The fast-growing gaming industry could not survive without the images that make up its games. Setting aside the many games that are made up entirely of images – such as sports and battle games – a number of games rely heavily on images. Celebrity trivia and travel games would not be the same without pictures of the people and places that provide their content.

In deciding that the photographs at issue here are not newsworthy, the Eleventh Circuit dismissed the significance of images to relay information standing alone. Its deceptively simple analogism would deprive virtually all photography of the protection afforded by the First Amendment. The Court reasoned that while public figures are the proper subject of news reports, "commercialization of their personality" is not protected. The court concluded that the photographs

are not newsworthy because "people are nude every day, and the news media does not typically find the occurrence worth reporting." 572 F.3d at 1209.

This makes no sense. The photograph honored by *National Geographic* on the cover of its "100 Best Pictures" edition is simply a face. It is a striking, haunting face, with green eyes and a fierce visage. The twelve-year-old Afghan girl, then living in a Pakistani refugee camp, could not know that her face would become known to so many. The Eleventh Circuit's reasoning would have deprived this photograph of its First Amendment protection. After all, people's faces are visible every day, "and the news media does not typically find the occurrence worth reporting." Yet, there can be little doubt that the face that twice occupied the cover of *National Geographic* is news, entitled to the protection of the First Amendment against claims of commercial appropriation.

The same is true of the photographs that can be found in *Star*, *People* and *US Weekly*. Many – indeed some of the most popular – photographs reveal everyday activities. Suri Cruise has been a star since she first went out in public, and pictures can be seen almost weekly of Suri and one or both of her parents shopping or playing in a park. A celebrity's favorite Starbucks or Jamba Juice drink – and even the water they drink or gum they chew – may also be a topic of interest. People shop every day, yet these magazines are filled with photographs of celebrities shopping. These photographs are news. The celebrities photographed certainly cannot seek compensation for appropriation of their commercial rights. Yet, the

Eleventh Circuit's reasoning would leave even photographs such as these open to claims.

The court below erred in two fundamental respects, both of which could have a devastating impact on all forms of media. First, the court was wrong in concluding that the photographs, standing alone, are not newsworthy. Perhaps if Ms. Benoit were not a public figure before her death, the Eleventh Circuit's decision might be defensible. But she was a public figure, who had generated tremendous interest in her persona. Ms. Benoit was a flamboyant star, known to many as "Fallen Angel" and then "Woman," who made news with her exploits in wrestling. Her costumes were outlandish, and many, such as the bikinis she frequently wore, were revealing, designed to exploit and capitalize on her sexuality. Wrestling fans loved it. The photographs, standing alone, were newsworthy because of what they revealed (figuratively, and literally) about this striking and outgoing public persona.

Second, the court below erred in concluding that no nexus existed between the photographs and the article they accompanied. Ms. Benoit and her son apparently were killed in a murder suicide by the wrestler Chris Benoit. Her death, like her life, captured the attention of the wrestling world. Particularly given her extravagant personality and the life she led, it is newsworthy that she posed for nude photographs early in her career.

Beyond that, the content of the photographs is newsworthy. *Amicus* submits that it cannot be questioned that an article describing the photographs would be newsworthy. They reveal unique

information about the early life of this celebrity, and what she was, at the time, willing to do to gain fame. Certainly, Ms. Benoit's career capitalized on her confident sexuality, which is apparent in these early photographs. For the very same reasons, the photographs themselves are newsworthy. They provide unique insight into the life of this public figure. The photographs added dimension to the newsworthy article they accompanied, and were newsworthy for that reason, also.

CONCLUSION

The Eleventh Circuit embraced the judicial blue-lining rejected by other circuits when it held that the photographs at issue here are not entitled to the protection of the First Amendment. This Court should resolve this circuit split and establish a broad protection for publishers that rejects liability so long as any argument can be made that the material at issue is relevant to a newsworthy topic. That standard, which should have resulted in a decision for petitioner below, gives the publishers the breathing room demanded by the First Amendment and ensures that they do not suppress newsworthy material out of fear of liability.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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MOTION FILED

DEC 2 8 2009

No. 09-625

IN THE
Supreme Court of the United States

LFP PUBLISHING GROUP, LLC,
D/B/A HUSTLER MAGAZINE,
PETITIONER,

v.

MAUREEN TOFFOLONI, AS ADMINISTRATOR AND PERSONAL REPRESENTATIVE OF THE ESTATE OF NANCY E. BENOIT,
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND THE SOCIETY FOR PROFESSIONAL JOURNALISTS IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2, The Reporters Committee for Freedom of the Press seeks leave to file a brief *amici curiae* in support of the petition for certiorari. Counsel for Petitioner has given consent. Counsel for Respondent denied consent on the basis of insufficient notice, although Respondent has previously been granted a thirty-day filing extension with Petitioner's consent.

The brief itself fully establishes that national media advocacy organizations are uniquely positioned to bring the court's attention to the nationwide First Amendment implications of the Eleventh Circuit's ruling in this case, and the chilling effect the opinion has on press freedoms.

This case concerns an issue critical to the press and the public in general: whether a court may use the constitutional right of privacy of the Fourteenth Amendment to defeat the First Amendment rights of publishers in a right-of-publicity case. *Amici* represent news reporters, editors, and publishers that struggle with daily editorial decisions and face the threat of potential liability. *Amici* respectfully request that this Court grant leave for filing of the brief.

Respectfully submitted,

Lucy A. Dalglish
Counsel of record

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STATEMENT OF INTEREST[1]

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The Society of Professional Journalists is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

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[1] Pursuant to Sup. Ct. R. 37, counsel for the *amici curiae* declare that they authored this brief in total with no assistance from the parties and that no individuals or organizations other than the *amici* made a monetary contribution to the preparation and submission of this brief. Counsel for petitioners consent to the filing of this brief. Due to *amici*'s confusion over the briefing schedule, amici gave counsel for Respondent only six days notice prior to the filing of this brief. However, the Court, with Petitioner's consent, previously granted Respondent a thirty-day extension for a response, thus giving Respondent more than thirty-six days notice of this brief before its brief is due.

This case concerns an issue critical to the press and the public in general: whether a court may use the constitutional right of privacy of the Fourteenth Amendment to defeat the First Amendment rights of publishers in a right-of-publicity case. *Amici* represent news reporters, editors, and publishers that struggle with daily editorial decisions and face the threat of potential liability. These journalists need clear First Amendment standards in order to disseminate the widest variety of information the public is entitled to receive.

SUMMARY OF ARGUMENT

This Court should grant Petitioner's petition for certiorari to articulate the proper First Amendment standard for newsworthiness with regard to misappropriation claims, and to reconcile the conflicting opinions of various Courts of Appeal. These claims uniquely impinge upon journalists' and the public's constitutional rights because they are routinely brought by plaintiffs who disapprove of certain editorial content, and have included suits against newspaper and magazine publishers,[2] television news outlets,[3] and documentary filmmakers.[4]

The Court should clarify that deference to the First Amendment should be strictly maintained in "right-of-publicity" claims against news gatherers

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[2] *See, e.g., Eastwood v. Superior Court*, 149 Cal. App. 3d 409, 415, 423 (Cal. Ct. App. 1983) (*National Enquirer* sued for misappropriation by actor Clint Eastwood for featuring his name and photograph on its cover and advertisements for an article about him); *Montana v. San Jose Mercury News, Inc.*, 34 Cal. App. 4th 790, 792-793, 794, 797 (Cal. Ct. App. 1995) (football player unsuccessfully sued newspaper for reproducing poster-sized pages of the paper to celebrate the San Francisco 49er's four recent NFL championships).

[3] *Baugh v. CBS, Inc.*, 828 F. Supp. 745 (N.D. Cal. 1993) (Plaintiffs who were shown on a weekly news magazine, "Street Stories" sued the network for airing footage of police response to plaintiffs' 911 call.)

[4] *See Dora v. Frontline Video, Inc.*, 15 Cal. App. 4th 536, 540, 543, 546 (Cal. Ct. App. 1993) (Famous surfer sued documentary filmmaker for misappropriation and other claims, but the court determined the film was on a matter of public interest).

and publications. Taken out of the context of nude, non-obscene photographs, the Eleventh Circuit opinion's limitations on newsworthiness make no sense, as it goes well beyond photographs that appear in magazines such as Petitioner's to affect all news-gathering.

The opinion, which allows the First Amendment of the Constitution to be trumped by a common law state tort claim, is in conflict with other Courts of Appeal that have held that to comply with the First Amendment, the newsworthiness exception to the right-of-publicity tort must be broadly construed if the publication is not for a *purely* commercial purpose.

The Eleventh Circuit opinion directly affects the media and journalists who disseminate information to the public. The court's reversal of the proper dismissal of the claim in the lower court threatens to chill all speech, particularly regarding the deceased. The court has created the prospect of open-ended privacy tort liability for publications and newscasts regarding the deceased, who for more than a century have been consistently held not to have privacy rights. More generally, the Eleventh Circuit has presented an unclear standard that will inevitably lead to confusion within the Circuit and among the other federal circuits that must be resolved by this Court.

ARGUMENT

I. The Eleventh Circuit's Overbroad Articulation of the Contours of the Right of Publicity Will Chill News Reporting by Essentially Allowing Posthumous Claims for All Invasion of Privacy Torts.

In perhaps aiming to offer some type of redress to a plaintiff who suffered embarrassment, the *Toffoloni* opinion seems to have, possibly inadvertently, confused the right of publicity with the very distinct right to privacy. Regardless, this conflation of what should be separate standards is highly problematic. The Court should elucidate the fundamental constitutional distinctions between torts prohibiting the invasion of a right of privacy and the right-of-publicity tort rooted in a devisable proprietary interest. The Eleventh Circuit appears to have used the right-of-publicity tort to redress very different privacy harms that were alleged because the late Ms. Benoit was pictured nude against the wishes of her mother, Ms. Toffoloni. The type of personal "injury" that deals with embarrassment or public disclosure is not the kind that may be remedied with a right-of-publicity claim, as underlying jurisprudence demonstrates.

Georgia, like many other states, has recognized a state tort claim for violations of a person's "right of publicity," arising from "the appropriation of another's name and likeness ... without consent and for the financial gain of the appropriator." *Martin Luther King, Jr. Ctr. For Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697, 703 (Ga. 1982). Indeed, Georgia courts have enforced the rights of private citizens, as well as entertainers like Ms. Benoit,

not to have their names and photographs used for the financial gain of the user without their consent, where such use is not authorized as an exercise of freedom of the press. *Id.* at 703.

This tort has its original roots in the 1890 law review article "The Right to Privacy," in which Samuel Warren and Louis Brandeis set forth the argument that let to recognition of privacy torts in American jurisprudence. 4 Harv. L. Rev 193 (1890). Notably, the authors were careful from the theory's earliest beginnings to articulate the right in a way that would honor the First Amendment, stating that this privacy right would "not prohibit any publication of matter which is of public or general interest." *Id.* at 214. This is the reasoning underlying the common law "newsworthiness" exception to right-of-publicity torts and privacy torts, which bars liability if a court determines that information is of public interest.

From the Warren/Brandeis article came the development of the common law privacy torts, most commonly divided into four separate causes of action: *intrusion* into a plaintiff's seclusion or private affairs; public *disclosure of embarrassing private facts*; publicity which places the plaintiff in a *false light*; and *appropriation*, for the defendant's advantage, of plaintiff's name or likeness. *See* William L. Prosser, Privacy, 48 Cal. L. Rev. 383, 398-407 (1960).

Particularly, the fourth misappropriation/right of publicity cause of action has been continuously articulated as being conceptually distinct from the other three. The Georgia Court of Appeals specifically found them easily distinguishable in the *Cabaniss* case, which first described the state's cause of action for right of publicity. *Cabaniss v. Hipsley*, 151

S.E.2d 496 (Ga. Ct. App. 1966). The court's opinion cited Prosser's assertion that "the interest protected is not so much a mental as a *proprietary* one, in the exclusive use of the plaintiff's name and likeness as an aspect of his identity." 48 Cal. L. Rev. at 406 (emphasis added). The court went on to say:

> Recognizing, as we do, the fundamental distinction between causes of action involving injury to feelings, sensibilities or reputation and those involving an appropriation of rights in the nature of property rights for commercial exploitation, it must necessarily follow that there is a fundamental distinction between the two classes of cases....

Cabaniss at 504.

This "fundamental distinction" is particularly clear with regard to the ability of a cause of action to accrue after a potential plaintiff's death. It is only because an improper appropriation of the right to publicity is analogous to the impairment of a property right and is meant to avoid "unjust enrichment of the defendants," that the publicity rights may continue to exist after death. Restatement (Second) of Torts § 652I (1977). As such, the theory underlying the right of publicity is in sharp contrast to that of the other invasion of privacy torts. The Restatement Second of Torts states, with support from the Fifth,[5]

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[5] *Santiesteban v. Goodyear Tire & Rubber Co.*, 306 F.2d 9 (5th Cir. 1962).

Sixth,[6] Seventh,[7] and Tenth[8] Circuits, as well as state appellate court decisions, "there is no action for the invasion of the privacy of one already deceased, in the absence of statute." *Id.* at cmt. b.

The Southern District of New York recently affirmed this reasoning, dismissing plaintiff's causes of action for injury to reputation and invasion of the right to privacy for lack of standing because there was an invasion of the deceased's privacy, and under the applicable state law, a relative of the deceased had no claim for that invasion. *Conradt v. NBC Universal, Inc.*, 536 F. Supp. 2d 380 (S.D.N.Y. 2008).

Publishers have relied on the ability to be free from "invasion of privacy" claims when discussing a person's death – which is very often newsworthy and of public concern, as in the case of Ms. Benoit. Arguably, the most in-depth and groundbreaking reporting on many subjects is disseminated when stories involve reporting on previously private aspects of the lives of the deceased. Stories of crime, from the mundane to the epic, such as Truman Capote's *In Cold Blood*, almost always delve into the past for investigatory purposes and to give context. The Eleventh Circuit ruling brings the ability to fully report all news into question, as its holding had no lan-

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[6] *Young v. That Was The Week That Was*, 423 F.2d 265 (6th Cir. 1970).

[7] *Maritote v. Desilu Productions, Inc.*, 345 F.2d 418 (7th Cir. 1965) (cert. denied).

[8] *Gruschus v. Curtis Pub. Co.*, 342 F.2d 775 (10th Cir. 1965).

guage linking its opinion to the specific features of the case.

The Court should clarify this and reiterate the fundamental distinctions between the torts that prohibit the invasion of privacy and the right-of-publicity tort based in a proprietary interest — the only one that may be asserted on behalf of the dead.

II. Because of these deeply rooted distinct analytical frameworks, the Eleventh Circuit erred in reasoning that the interests underlying Georgia's common law right of publicity are *freely interchangeable* with the Fourteenth Amendment right to be free from government intrusion into the private sphere.

In articulating the contours of the right of publicity under Georgia law, the Eleventh Circuit failed to cite *any* opinion that interpreted the right to publicity, specifically, and not one of the other privacy torts — especially problematic because of the crucial constitutional implications at bar.

In stating that the right of publicity must attach to information that is "not open to public observation" and is appropriated for the commercial benefit of another, the court cited *Virgil v. Time Inc.*, a Ninth Circuit case that addressed the tort of public disclosure of embarrassing private facts about the plaintiff — a tort which would not be available to the relative of a deceased plaintiff. 527 F.2d 1122 (9th Cir. 1975).

The Eleventh Circuit also noted the Supreme Court of Georgia's admonishment that defendants

not to be "guilty of an abuse of [the First Amendment] privilege by invading the legal rights of others" in the 1905 case of *Pavesich*, which was not particularly relevant to an analysis of the facts surrounding the article about Ms. Benoit, as the *Pavesich* case dealt with a private citizen's photograph in pure, undisputed commercial advertisement. *See Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 81 (Ga. 1905). Furthermore, the case dealt only abstractly with the right of publicity because the tort had not yet been recognized by law. *See Martin Luther King, Jr. Ctr. For Soc. Change, Inc.*, 296 S.E.2d at 702. (explaining *Cabaniss*'s subsequent recognition of the right-of-publicity tort).

Most problematically of all, the Eleventh Circuit, without citing any legal authority, states:

> Both the rights to freedom of speech and freedom of the press, as guaranteed by the First Amendment, and the right to privacy, as guaranteed by the Due Process Clause, are fundamental constitutional rights. *The Constitution directs no hierarchy between them.* Thus, courts are required to engage in a fact-sensitive balancing, with an eye toward that which is reasonable and that which resonates with our community morals. . . .

Toffoloni v. LFP Publishing Group, LLC, 572 F.3d 1201, 1207-08 (11th Cir. 2009) (emphasis added).

The court got it wrong. This case did not involve a plaintiff's "constitutional right" of privacy to be

balanced against the defendant's First Amendment rights,[9] rather it involved a plaintiff's right to file a claim in order to redress an alleged tortious violation of the deceased's right to publicity. Therefore, the proper balancing would be between one potential state tort claim and the fundamental rights of the First Amendment — a far different analysis than the one undertaken by the Eleventh Circuit.

The analysis failed to note that *Pavesich* was the Georgia Supreme Court's first attempt at recognizing a cause of action for invasion of privacy. It surveyed the entire field of privacy interests, including those interests in freedom from *government* intrusion into the home. Protection from state interference with privacy is, of course, the root of the due process and Fourteenth Amendment privacy interests, and those constitutional guarantees are not relevant in the civil context. This fundamental right has been defined as "the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *see also Griswold v. Connecticut*, 381 U.S. 479 (1965).

The court's imprecise analysis here would inadvertently allow any family member to assert *any* privacy tort claim on behalf of a deceased relative because of their personal preferences about publica-

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[9] Even when such a right exists, "where . . . one is a public personage, an actual participant in a public event, or where some newsworthy incident affecting him is taking place, the right of privacy is not absolute, but limited." *Gautier v. Pro-Football, Inc.*, 304 N.Y. 354 (N.Y. 1952).

tions' editorial content under the guise of a violation of the relative's "right to publicity."

The effects of this opinion are much more far reaching than just applying to magazines that publish nudity. It would prevent media outlets from covering matters of public interest involving anyone living or dead, even a public figure like Ms. Benoit, because it would prompt future courts to weigh *equally* any individual's privacy rights against a publication's First Amendment rights. This is completely contrary to what privacy jurisprudence has contemplated over its relatively short history.

III. The Eleventh Circuit Misinterpreted The Meaning of Newsworthiness and Made Unconstitutional Intrusions Into the First Amendment rights of Publications to Have Full Control Over Editorial Content.

A. Even if the Court Found the Photographs Infringed on the Devisable Right of Publicity, the Eleventh Circuit's Articulation of the "Newsworthiness" Violates the First Amendment and Conflicts With Other Circuits.

With regard to the newsworthiness exception to right-of-publicity claims, the term "newsworthiness" is something of a misnomer because as courts have recognized, judges "should be chary of deciding what is and what is not news." *Harper & Rowe v. Nation Enterprises*, 471 U.S. 539, 561 (1985). The exception to the tort is for *non-commercial editorial use*. The proper role of a court in making the newsworthiness determination is not to judge the degree of value or interest to the public but whether it is or is not a

purely commercial communication to the public, as "the scope of the privilege extends to almost all reporting of recent events...." *Eastwood,* 198 Cal. Rptr. at 349-50.

The Eleventh Circuit's interpretation of the newsworthiness standard poses a significant risk to news organizations' reporting and photojournalism. The "newsworthiness" exception has traditionally been given — and to comply with the First Amendment, must be given — broad deference. The "newsworthiness" inquiry undertaken by the other Circuits has consistently turned on whether the speech is purely commercial and this Court should grant review to reconcile the standard with that of other Circuits.

Indeed, in the 1905 case relied on by the Eleven Circuit opinion at issue, the Georgia Supreme Court in *Pavesich* broadly articulated the theory of a newsworthiness exception, and explicitly pointed out the fundamental differences between commentary and advertising:

> "What we have ruled cannot be in any sense construed as an abridgment of the liberty of speech and of the press as guarantied [sic] in the Constitution . . . [C]ertain it is that one who merely for advertising purposes, and from mercenary motives, publishes the likeness of another without his consent, cannot be said, in so doing, to have exercised the right to publish his sentiments."

50 S.E. at 80.

Of course, the newsworthiness-public interest privilege is limited to uses which have a "reasonable relationship" to a matter of public interest, and do not represent a "mere disguised commercialization." David Elder, *Privacy Torts* § 6:9 (2002). But this "reasonable relationship" standard has traditionally been given very broad latitude. Courts have not approached the newsworthiness of a publication as an element to be proved or disproved; but whether the speech falls in a category that is strictly commercial and whether the report is true. *See, e.g., Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1197-98 (9th Cir. 1989); *Eastwood*, 149 Cal. App. 3d 409 (Cal. Ct. App. 1983).

Although it can be difficult to define "commercial speech," this Court has written that the "core notion" of commercial speech is that it "*does no more* than propose a commercial transaction." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983) (emphasis added). Furthermore, that "[t]here are commonsense differences between speech that does no more than propose a commercial transaction and other varieties," *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n. 24 (1976) (quotations and citation omitted).

Specifically, with regard to First Amendment rights of organizations that sell "expressive" materials, the Ninth Circuit has stated that "any commercial aspects are inextricably entwined with expressive elements, and so they cannot be separated out from the fully protected whole." *Hoffman*, 255 F.3d 1180, 1185 (9th Cir. 2001) (quotations omitted; discussed more fully *infra* at III.C.).

Tellingly, the Ninth Circuit has found that with regard to the *very same publication* at issue in this petition, the magazine's inclusion of certain features "solely or primarily to increase the circulation of its magazine and therefore its profits" did not transform it into a purely commercial or advertising use and thus the material was privileged under the newsworthiness exception to the right of publicity. *Dworkin* at 1197-98. This is directly contrary to the Eleventh Circuit ruling in this case.

B. This Court Has Explicitly Held That Governmental or Judicial Intrusion Into the Editorial Print Process is Unconstitutional and Particularly Repugnant to First Amendment Interests.

In *F.C.C. v. League of Women Voters of California*, this Court wrote: "The expression of editorial opinion on matters of public importance ... as we have repeatedly explained ... is entitled to *the most exacting degree of First Amendment protection.* 468 U.S. 364 (1984).[10] And particularly with regard to print media, which has always been the expressive medium given the strongest First Amendment pro-

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[10] "The unrestricted distribution of newspapers and magazines . . . is at the heart of the First Amendment." *Lewis v. Time Inc.*, 83 F.R.D. 455, 465 (E.D.Cal.1979), aff'd 710 F.2d 549 (9th Cir. 1983); *Cf. Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989) ("We hold only that where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order.").

tection,[11] the Court found unconstitutional the "intrusion into the function of editors in choosing what material goes into a [publication] and in deciding on the size and content of the paper and the treatment of public issues..." *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 241-42 (1974).

This reasoning absolutely extends to the publication of visual art elements, as this Court in *Reagan v. Time Inc.* held that government approval of a photograph is an impermissible content-based discrimination in violation of the First Amendment, specifically noting that "the Government simply has no business second-guessing editorial judgments as to the communicative value of illustrations...." *Regan v. Time Inc.*, 468 U.S. 641, 679 n.16 (1984).

The Eleventh Circuit's overbroad holding has eviscerated the media's formerly robust First Amendment protection from the right-of-publicity tort. By engaging in a judicial dissection of the editorial piece on Ms. Benoit to determine which portions were sufficiently "newsworthy" (a misreading of the proper standard), the Eleventh Circuit has infringed the First Amendment rights of editorial decision making of all news outlets that publish photographs of any person. Because news outlets will now fear liability for invading the "privacy" of anyone, living or

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[11] *See, e.g., Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 653 (distinguishing cable providers' diminished First Amendment rights from the more robust First Amendment rights of print media) ("[T]he First Amendment protects the editorial independence of the press.").

dead, subject to an extremely vague "newsworthiness" analysis, the Eleventh Circuit opinion violates the First Amendment rights of journalists, editors, and other creators of media. This functional government intrusion into journalists' editorial decision-making in *Toffoloni* is unconstitutional.

C. The Ninth Circuit's Analysis in *Hoffman* Illustrates the Proper Standard for "Newsworthiness" and Directly Contradicts the Eleventh Circuit Opinion.

The Ninth Circuit in *Hoffman* addressed a public figure's claim for invasion of his right of publicity and set forth a newsworthiness analysis that would be both properly deferential to the First Amendment and widely applicable. The court held that a magazine article that featured a famous actor's altered photograph to showcase a designer gown was non-commercial speech because the article did not have the *sole purpose* of selling a particular product — the clothing pictured. *See* 255 F.3d at 1185.

In contrast, the Eleventh Circuit's analysis dissected the elements of the magazine article and accompanying photos and analyzed them individually. The court concluded that while the text of the article was newsworthy, the photographs were not, and thus this transformed the entire piece into a commercial use of the photographs. In its analysis, the court analyzed text from the cover, text from the table of contents, the article's title, the length of text on each page, and the ratio of photographs to text. *See Toffoloni*, 572 F.3d at 1209. Then the court made the sweeping statement that the "heart" of the article was not the biography of Ms. Benoit, but the photo-

graphs, and thus it was a commercial, non-newsworthy use — an overbroad assessment that has no corresponding legal authority. *Id.*

In *Hoffman*, the Ninth Circuit stated that just because an article featuring a photograph of actor Dustin Hoffman as his movie character "Tootsie," and had elements that vaguely proposed that the reader purchase the outfit featured on the image of Hoffman, this did not transform the photograph into pure commercial speech. *See* 255 F.3d at 1185.

The court wrote that because the altered photograph was not within an advertisement, and instead advanced more than just a commercial message, "common sense tells us this is not a simple advertisement." *Id.* Furthermore, the court acknowledged that although magazines use articles and photos to "draw attention to the for-profit magazine in which it appears," it does not mean that such articles "fall outside of the protection of the First Amendment because it may help to sell copies." *Id.*

The Ninth Circuit's opinion demonstrated the proper breadth of the "newsworthiness" exception with regard to editorial content, viewed as a whole, in direct contrast with the Eleventh Circuit's opinion in *Toffoloni*, which threatens to subject any publication that contains illustrated articles to an overly intrusive analysis of every element of its product. The Eleventh Circuit opinion calls into question every news article that has a photograph of a person, fully-clothed or not, into question as a potential violation of that person's right of publicity. Because a newsworthiness analysis that does not rest on the distinction between the purely commercial and not purely commercial does not give proper deference to the

First Amendment, the Court should not allow the Eleventh Circuit's arbitrary limitations on the "newsworthiness" exception to remain in place.

CONCLUSION

The combination of the flawed reasoning for denying defendant's newsworthiness exception to the Georgia right of publicity in this case and the Eleventh Circuit's improper deference to the constitutionally protected right of editorial selection results in an unconstitutional chilling effect on all publications. If permitted to stand, this verdict threatens news organizations in the Eleventh Circuit and throughout the country and exposes them to the threat of similar legally unsupportable liability. *Amicus* therefore respectfully requests that this Court grant Petitioner's petition for certiorari.

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